REPORTS

OF

CASES

ADJUDGED IN THE

Court of King's Bench:

WITH SOME

SPECIAL CASES

IN THE

Courts of Chancery, Common Pleas, and Exchequer,

ALPHABETICALLY DIGESTED UNDER PROPER HEADS;

FROM THE FIRST YEAR OF KING WILLIAM AND QUEEN MARY, TO THE TENTH YEAR OF QUEEN ANNE.

BY WILLIAM SALKELD,

LATE SERJEANT AT LAW.

FROM THE SIXTH LONDON EDITION:

INCLUDING THE NOTES AND REFERENCES

OF

KNIGHTLEY D'ANVERS, Esq. and Mr. Serjeant WILSON;

AND LARGE ADDITIONS OF NOTES AND REFERENCES TO MODERN AUTHORITIES AND DETERMINATIONS,

BY WILLIAM DAVID EVANS, Esq.

BARRISTER AT LAW.

IN THREE VOLUMES.

VOL. III.

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THE

PREFACE.

SINCE the former Volumes of Mr. Serjeant *Salkeld's* Reports were published with the approbation of the most eminent professors of the Law, it may not be improper to inform the Reader, that the following Cases were undoubtedly collected by the same hand.

This will be very evident to those who read and compare them with the former, because the same judgment and perspicuity runs through the whole; and as an indubitable proof, that these Cases are genuine, the Original Manuscript, from whence they were transcribed, written by the Author's own hand, is now in the possession of the Editors, and may be seen by any person that desires it.

This Volume contains more than four hundred and forty Cases; and although the names of some of them have been already printed, yet they are only the names, and not the matter, since the arguments both of the Bench and at the Bar are generally new; and in all of them some new matter is added, which renders this Collection a proper Supplement to those that have been already printed.

There are likewise some Cases abridged in the following Collection, which may be found more at large in the cotem-

porary Reports; but even these may be of some use, because they are placed under proper titles in imitation of *Rolle's Abridgment;* and it may reasonably be presumed, that the learned Serjeant would not have abridged any Cases, but those that were suitable to such titles, and very well worth observation.

And since Orders made by Justices of Peace, concerning the removal and settlement of the poor, have of late made a considerable title in the Law, and since it appears by the Author's former Reports, that he took particular care to state the resolutions of the Judges in such Cases, the Reader will find in this Volume several judgments in Cases of that nature, and those digested under proper titles, which were never yet printed in any Book of Reports whatsoever.

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TABLE

OF THE

NAMES OF THE CASES

IN THE

THIRD VOLUME.

THE CASES IN THE THIRD VOLUME.

ABATEMENT:



1. ANONYMOUS.

[Mich. 4 Ann.]

Matter in bar may not be pleaded in abatement.

AN administrator brought an action of debt on a bond; the defendant pleaded in *abatement*, that administration was granted to another, and upon a demurrer it was insisted, that though this is matter in bar, yet it might be pleaded in abatement: for so it is in the case of *outlawry* and *property*, which may be pleaded either in bar or in abatement: but *per Holt*, Ch. Just. it was ruled, that the defendant should answer over, for matter in *bar* must not be pleaded in *abatement*.

2. KEMP *v.* ANDREWS.

[Mich. 2 Will. 3. B. R. Rot. 289.]

3 Lev. 290. Where a plea is ill in bar, but good in abatement.

IN trover and conversion, the plaintiff declared, that he, together with *A.* and *B.* both now dead, and whom he survived, being possessed of a ship and goods, lost them, and that the defendant found and converted them to his own use, who pleaded in *bar* to the action, that the said *A.* and *B.* made their wills in writing, and thereby appointed several executors and died, and they in their lifetime, together with the plaintiff, were possessed of this ship and goods as merchants, and that there is no *survivorship* between merchants, and so concludes in *bar;* and upon demurrer to this plea it was adjudged ill in *bar*, but it had been a good plea in *abatement* (*a*).

(*a*) It seems the last point cannot be correct, as it is ruled, 2 *Salk.* 444. 1 Ld. *Raym.* 340., that the *remedy* among merchants survives, but not the duty.

ABILITY AND DISABILITY.

ANONYMOUS.

[Mich. 2 Ann.]

A woman may execute an office by herself, or by deputy.
Vide Callis on Sewers, 201.
2 Inst. 382.
2 Cro. 18.
4 Inst. 311.
Str. 1114.
2 T. R. 395.

A WOMAN was appointed by the justices to be governess of a work-house at *Chelmsford*, and Mr. *Parker* moved to quash the order, because it was in the nature of a house of correction, and so the office was not suitable to her sex: but *per Powel* and the rest, *absente Holt*, Ch. Just. It is a good appointment, and she may be capable of executing the office either by herself or *deputy*, as the Lady *Broughton* did, who was appointed keeper of the *gate-house* at *Westminster*.

ACCEPTANCE.

Where the title is to a thing in gross, a man is not bound to accept it by parcels.

ADJUDGED, that where a man is entitled to a thing in *gross*, he is not bound to accept it by *parcels;* as for instance, if *A.* be bound to deliver a ton of wine to *B.*, and tenders part of it, *B.* is not bound to accept it.

Lessor is not bound to accept part of the rent.

So where the lessor *distrains for rent in arrear*, and the lessee *tenders part of it*, the lessor is not bound to *accept* it; but if he distrain for arrears due at *several days*, on which it ought to be paid. and the lessee tenders the arrears due on such a day, the lessor is bound to accept it. The case is the same if the lessor *bring an action of debt instead of distraining* for the rent due on several days, but if there is no tender of any part, and the lessor get judgment for the whole, it is now become an entire duty, and if upon execution sued out the lessee tenders any part of it, the lessor is not bound to accept.

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So in *detinue* for divers parcels of goods, if the plaintiff get judgment for the whole, and after execution taken

forth the defendant tenders some part to the plaintiff, he is not bound to accept it.

bound to accept part.

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Lease for years, rendering rent, proviso to be forfeited if the lessee aliened or assigned to another; the lessee *aliened*, and the executor of the *alienee* paid the rent to the lessor, and though it was not alleged, that he did know the lease was * *aliened*, (*viz.*) by assignment to another, but only that he (the lessor) knowing the other to be the executor of the assignee, had accepted the rent of him; it was adjudged he should not enter for a forfeiture against his own † *acceptance*, for it shall be intended he had notice of the assignment, if the contrary doth not appear. See ‡ *Witchcot's* case.

No entry for a forfeiture after acceptance of the rent.
* See 3 Rep. Penant's case. Cro. Eliz. 453. Moor 456. S. C.
† 2 Bulst. 151. Cro. Eliz. 715.
‡ 2 Cro. 398. 1 Roll. Rep. 389.

So if the lessee covenant for him and his *assigns* to *repair*, the assignee of the lessee by his *accepting* such assignment is liable, for this is a covenant which runs with the land.

Vide post 47.

The husband and wife made a lease of the lands of the wife, then the husband died, and the wife married again, and this second husband *accepted* the rent. Adjudged, that by such acceptance he had affirmed the lease, even *quoad* the wife herself, because she had resigned her election to her second husband, and he by his acceptance of the rent had affirmed the lease.

Dyer 195. Roll. 475.

Lease to *W. R.* for life, rendering rent at *Michaelmas*, with a clause of re-entry for non-payment; the rent was in arrear, and afterwards the lessor brought an action for the rent. Adjudged, that notwithstanding this action he (the lessor) might still enter for a breach of the condition, for the action for the rent did not affirm the lease, because it shall be intended to be brought as for a duty due upon the contract; but if he had *distrained* for the rent not being paid on the day, then he can never afterwards enter for a breach of the condition, because the *distress* affirms the continuance of the lease.

1 Inst. 211. 1 Leon. 262.

A gift was made to the husband and wife, and to the heirs of their bodies, they afterwards made a lease of the lands, reserving rent on such a day, with a clause of re-entry, then the husband died, and the rent being in arrear the issue in tail accepted it. Adjudged, that this was no affirmance of the lease as to himself, because the rent was not due to him whilst his mother was living; but it had been otherwise, if he had accepted it after her death.

3 Rep. 64. Where acceptance of the rent is no affirmance of the lease.

Adjudged, that an acceptance of a collateral thing is no bar to a title of freehold, and that an acceptance of rent after the day of payment will not bar a right of entry vested by non-payment, because the rent being a duty, and owing, the party might well accept it; but it is otherwise after a *distress* taken, or if the rent is accepted at another day subsequent, for this affirms the continuance of the lease.

Acceptance of rent after the day of payment no bar to a right of entry.

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2. ANONYMOUS.

Acceptance of rent will not make a lease good. 1 Roll. 476. Cro. Car. 512.

LEASE for years upon condition to be void, if the lessee assigns over the term; he afterwards made an assignment, and the lessor knowing it accepted the rent. Adjudged, this will not make the lease good, because it was absolutely void before the acceptance.

3. SMITH v. ARNOLD.

* Cap. 34. Assignee is liable to all covenants which run with the land. † 1 Salk. 199. Vide 3 Wils. 25. Comyns, Covenant, C. 3.

THE statute * 32 *H.* 8. enables a grantee of a reversion to enter for a condition broken, and to bring an action of covenant, *&c.* The case was, lessee for life covenants for himself, his executors and administrators, to † build an outhouse on the lands of the lessor, and afterwards the lessee for life assigns his estate to *T. S.* The question was, Whether such assignee might be charged in an action of covenant, if the outhouse was not built? It was insisted, that he could not, because the assignor had covenanted only for himself, his *executors and administrators*, leaving out the word *assigns*, which is very true: But adjudged, that the assignee by the ‡ *acceptance* of the possession of the lands, had made himself subject to all the covenants which run with the land, of which repairing is one, building is another, and to such he is bound without being named by that special word *assigns*, but not to any collateral covenants.

‡ 2 Cro. 125. Godb. 69. 5 Rep. 24. Moor 399.

4. WALLIS v. WOOD.

When part of the rent became due, pending an action against an administrator Vide Jones 223.

LEASE for years was made to *T. S.* rendering rent, which being in arrear the lessee died intestate, and administration was granted to the defendant, against whom an action of debt was brought for rent, who pleaded, that the intestate had assigned the term, and that after such assignment the lessor had accepted rent of the assignee. The parties were at issue upon the acceptance of the rent, and the plaintiff had a verdict; but because part of the rent became due pending the action, the plaintiff could never get judgment.

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5. PARKER v. WEBB

Grantee of a reversion may have covenant after the assignment of

THE case was, the lessor being seised in fee, made a lease of the lands for years to the defendant, rendering rent at *Michaelmas* and *Lady-day*, in which lease the

defendant covenanted to pay the rent, &c.; afterwards the lessor granted the reversion to the plaintiff, to which grant the defendant attorned, and an action of covenant being brought against him for non-payment of rent, he pleaded, that he had assigned his term to *D. D.* before the grant of the reversion made to the plaintiff, and upon a demurrer to this plea, *per Holt*, Chief Justice, it is ill; for he ought to have set forth, that the plaintiff had accepted rent from the assignee, or that he had notice of the assignment; but if that had been pleaded, the plaintiff should still have judgment, because he, being grantee of the reversion, may maintain this action against the lessee, even after the assignment of the term, and though he had accepted the rent after such assignment; and this he might do upon the express covenant of the lessee to pay it, which is a covenant that runs with the land.

the term. Vide 5 Co. 17. B. Co Lit. 385. a. 3 Lev. 233. 2 Roll. 64. Cro. Eliz. 529.

ACTION IN GENERAL.

ADJUDGED, that a *scire facias*, or any writ to which the defendant may plead, is an *action*, or by which a plaintiff may recover.

2 Wilson 251. 2 Salk. 603.

In *personal actions*, if the plaintiff is barred, as in an action of debt or accompt, he can never bring the same action again, nor hath he any remedy but by writ of error, or attainting the jury.

Vide 3 Wils. 304

But in *real actions*, if the plaintiff is barred he may resort to a higher remedy; as if he is barred in an *assise*, he may bring a *mortd' ancestor;* if in a *formedon* in *descender*, he may bring a *formedon in reverter* or remainder.

6 Co. 7. b

If a man recover in *trespass* he shall not afterwards have *mayhem*, for it is to get the same recompence again; but he may have an appeal of robbery, because the judgment is not for damages, but against the life of the defendant.

4 Rep. 43. Moor, pl. 416. Hudson's case. Yelv. 84.

*Where two are bound jointly and severally in a bond, and the obligee gets judgment against one and takes him in execution, yet he may proceed against the other, because the debt is not paid or satisfied (*a*).

2 Cro. 75. Yelv. 67.

[* 6]

(*a*) *R.* 4 *T. R.* pa. 825. That the holder of a bill of exchange may proceed against the drawer or indorser after taking an accepter in execution.

And so he may, if the sheriff suffer him, whom he had in execution, to escape.

One promises to pay *W. R.* 40*l.* (*viz.*) 10*l.* on such a day, and so on till all is paid; an action lies upon the first failure of payment.

*Cro. Eliz. 118. 1 Cro. 241. 1 Inst. 292.

So it is in **covenant*, and so it is in a *recognizance.*

But if a bond of 40*l.* is given conditioned to pay, (*viz.*) 10*l.* on such a day, and so on, debt will not lie till the last day.

Owen 42. 1 Cro. 241. 2 Saund 337. Vide Co. Litt. 292. b. Bull. N. P. 168. 1 H. Bl. Rep. 550.

But if the bond is to pay 20*l.* on such a day, and 20*l.* on such a day, there debt will lie upon the first failure; therefore there is a difference where a bond is to pay 40*l.* (*viz.*) 10*l.* on such a day, and 20*l.* more on such a day, because in the case of the *videlicet*, though the duty is entire, the *videlicet* divides the parcels.

Comyns, Action, F. Co. Litt. 292. 2 Wils. 80.

But where a man is bound in a bond (*with condition*) to pay 100*l.* (*viz.*) 50*l.* on such a day, and 50*l.* on such a day, debt lies upon the first failure, because the condition is broken.

Cro. Eliz. 68, 110. Vide Comyns, Pleader, C. 19. St. 16 & 17 Ch. 2. ch. 8.

Where it appears upon the record, that the action is brought before the cause of action arises, either in the declaration or in the verdict, or otherwise by the plaintiff's own shewing, he shall never recover; but where it is a matter alleged by the defendant, but not insisted on, so that issue is taken upon another point, and the truth of the fact alleged doth not appear, there the plaintiff shall have judgment, if he recover.

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ACTION POPULAR.

ADJUDGED, that the king has no privilege in an action *qui tam pro domino rege, &c.* and that the prosecutor may pray a *tales* without the consent of the attorney-general, and he may nonsuit.

Et per Holt, Chief Justice: Where a certain penalty is given by a statute to the party grieved he needs not join the king, for it is like a private act, only for his benefit.

*Rast. Entr. 433. †Rast. Entr. 126, 193.

But it lies for *indicting a man in a *foreign country;* it lies for a †*scandalum magnatum*, for the king is prejudiced by the act, which is the ground of the action.

It lies against the sheriff if one taken upon a *capias utlagatum* escape, or against the rescuer, if he be rescued; but the plaintiff is not bound to bring it in *tam quam*, &c. but may bring debt alone in his own name. *Et nota*, in these cases, though the action is in the *tam quam*, the party shall have all the damages; but in some cases, as upon the statute of *hue and cry*, and the statute for not appearing as a witness, being served with a *subpœna*, the party may either bring *debt* or *case*; if he bring *debt*, he must sue without the king, for the debt is not due to him, but to the party grieved; but if he bring an action on the case, he must sue in the *tam quam*, for the action is founded on the *tort* only, and that is to the king as well as to the party, *per Holt*, Chief Justice.

Roll. Abr. 1. 2 Cro. 361, 620. Bridgm. 8. 1 Roll. Rep. 78. Vide 2 Hawk. 379. Comyns, Action upon statute E. 2.

" *Nota*, The following rule was made by the Court in " *January* 1682. That all clerks of the assize and associ-" ates do return the *posteas in all popular actions and inform-" ations qui tam*, &c. into the respective offices from whence " they issue, and to receive their fees for the returning " thereof at the trial from the party, for whom the verdict " shall be given; and that the masters of the respective " offices, to whom the said *posteas* shall be returned by the " clerks of assize, shall send a note into the Exchequer to " the clerks of the estreats, that the sheriffs of the respec-" tive counties may be charged with the same."

Raym. 479. S.C. Clerks of assize to return the posteas in all popular actions.

ACTIONS ON THE CASE. [8]

Good and not good, where brought before the Time of Action.

1. ROGERS *v.* REARSBY.

[Pasch. 2 Annæ. 2 Ld. Raym. 870. S. C.]

IN *ejectment*, the demise was laid on the *20th day of October*; upon not guilty pleaded, the plaintiff had a verdict, and it was moved in arrest of judgment, that the **essoin-day*, which in the law is accounted the first day of the term, was on the same *20th day of October*, on which the

The essoin-day was the day in which the demise was laid, and good. * 1 And. 240. Vide 1 T. R. 116.

demise was laid, and so this *ejectment* was brought by the plaintiff before he had any cause of action; but this objection was not allowed; for *per Curiam*, the action and the wrong may be upon one and the same day, and this being by original may be sued out after the commencement of the term, and returned, especially in so long a term as *Michaelmas* term is; but admitting it to be a slip, the defendant should have taken advantage of it upon *oyer* (*a*).

(*a*) *Vide Barnes* 340. *Dougl.* 215, 459. 1 *T. R.* 149.

2. BLACKHALL *v.* EVANS.

[Mich. 3 Georgii (*b*).]

Battery laid to be done on a day not yet come. * 1 Lev. 299.

† Hob. 189, 245, 277. S. P.

‡ Cro. Eliz. 68, 110. ad. Raym. 463.

IN *assault and battery*, upon not guilty pleaded the plaintiff had a verdict; it was objected in arrest of judgment, that the battery was laid to be committed on a day * not come when the verdict was given; but this objection was disallowed, because it being impossible it should be committed after the verdict was given, it is as if no time at all had been laid in the declaration, for an † impossible time is no time, and in such case it can never be intended that the jury gave damages for a battery which was not then done: it is true, if the plaintiff had laid a time *after the action and before the verdict*, the damages must be intended to be given for the battery then done, that is, at the time of the action brought; but that ought not to be ‡, because at that time the plaintiff had no cause of action.

(*b*) This seems evidently to be the same case which is reported 2 *Salk.* 662., by the name of *Acton* v. *Eels.* *M.* 8 *Wm.* 3.; for that case in *Comyns* 12. is intitled *Blackhall* v. *Heal.*

3. SMITH *v.* WESTHAL.

[1 Ld. Raym. 316. S. P. Comyns 49, 50. S. P.]

‖ 29 Car. 2. cap. 3. par. 17. Where a memorandum in writing is not necessary. See postea Bourkmire v. Darnell.

BY the statute of ‖ *frauds, &c.* it is enacted, *That no action shall be brought upon any agreement, which is not to be performed within a year after the making thereof, unless there be a* memorandum *of the agreement in writing, and signed by him who is to be charged therewith.* An agreement was made, that in consideration of 5 *l.* paid by the plaintiff to the defendant, he (the defendant) promised to pay the plaintiff 10 *l.* *upon his day of marriage*, which happened about 9 years after this agreement; and now an action

being brought upon this promise (*a*), it was adjudged, that a *memorandum in writing* was not necessary in this case, because the marriage might have happened within a year after the agreement made (*b*).

(*a*) This was not the point in the cause, but cited as a former determination, and admitted. *Vide* the report in 1 *Ld. Raym.* 316.

(*b*) *Vide ac.* 1 *Salk.* 280. *Str.* 34. 3 *Bur.* 1278. 1 *Bl. Rep.* 353.

4. SAWEN *v.* HULBERT.

In trover, the declaration was general, as of Michaelmas term, and the conversion was laid on a day certain in that term, and yet good.

IN *trover* the plaintiff had a verdict, and it was moved in arrest of judgment that the declaration was ill; because the *conversion* was laid on a day certain in *Michaelmas* term, and the declaration was general as of that very term without a day certain; as *memorandum*, that on such a day, and therefore it must relate to the first day of that term, and if so, then this action was brought before the plaintiff had any cause of action, because it was brought as on the first day of the term, and the *conversion*, which is the foundation of the action, was laid in the declaration to be after the term began. But *per Holt*, Chief Justice, it is well enough, if the bill was filed after the cause of action accrued, for there was no action depending till that very time, and the filing the bill was on a day certain.

Vide Str. 1271.

For Malefeasance, Misfeasance, and Negligence.

5. KEEBLE *v.* HICKERINGHALL.

Case lies where the plaintiff had a possession without any property.

CASE, *&c.* in which the plaintiff declared, that he was possessed of a *decoy pond* frequented with *ducks*, of which he made great gains, and that the defendant knowing and maliciously intending to deprive him (the plaintiff) of the use and benefit of his said *decoy pond*, did on such a day and place, *at one time*, discharge and shoot off *six guns*, and at another time *four guns to fright away his ducks*, *&c.* upon not guilty pleaded the plaintiff had a verdict; it was objected in arrest of judgment, that the defendant stood on his own ground, and so could not be guilty of a trespass in the close of the plaintiff; besides the declaration is ill; for the plaintiff did not set forth how many ducks were frighted away, or if he had, it had been ill, because being wild-ducks, he had no property in them. *Holt*, Chief Justice. A *decoy pond* is a kind of trade, and of great profit to the owner, and by the same reason that an

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action will lie for *malicious words* spoken by one tradesman of another, it will lie for a *malicious act* done by one to another, for in both cases it is prejudicial to the plaintiff. If one man keeps a school in such a place, another may do so likewise in the same place, though he draw away the scholars from the other school, it is true, this is *damnum*, but it is *absque injuria;* but he must not shoot guns at the scholars of the other school, to fright them from coming there any more. And as to the other objection, the plaintiff needs not shew *how many ducks* were frighted, because it is impossible for him to do it, and though they were *wild*, yet they were *fluminea volucres*, and in the plaintiff's decoy pond, and so in his *possession*, which is sufficient without shewing that he had any *property* in them.

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6. WHEELER *v.* BAKER.

[Mich. 8 Gulielmi.]

Where the whole term was assigned by parol, the asignor cannot have an action, because he hath no residuary interest.

Vide 1 Salk. 13.

LESSEE of a house *for* 3 *years*, *assigns* it to *W. R.* for 3 *years* by parol; the house was afterwards burnt, and the *assignor* brought an action on the case against the *assignee* for damages. Adjudged, that it would not lie, because he had no *residuary interest* in the house, neither is he liable over to the first lessor, because the assignment was lawful: The cause had been the same, if he (the plaintiff) had demised to *W. R.* for 5 years, for this would only have amounted to an assignment of his term, so that he gains no reversion by it; it is true, it had been otherwise, if the lease had been by *indenture* or estoppel; but if the lessee had assigned for *two years*, he might have an action against *W. R.* the *assignee*, because there was a reversion in him (the lessee); and in such case it is always necessary for him to declare, that he had an interest *adtunc ventur'* (*viz.*) when the house was burnt. But this action is now taken away by the statute * 6 *Annæ*, by which it is enacted, That no action shall be maintained against any one in whose house or chamber any fire shall accidentally begin; and if any action shall be brought, the defendant may plead the general issue, and give this act in evidence, and if the plaintiff be nonsuit, discontinue, or a verdict be against him, the defendant shall have treble costs. Proviso; that nothing therein shall make void any agreement between landlord and tenant. This act was only temporary for three years; but by another statute *anno* † 10 *Annæ*, this clause was made *perpetual*.

* 6 Annæ, cap. 31.

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† 10 Annæ, cap. 14.

7. COGGS *v.* BERNARD.

[Trin. 2 Annæ. 2 Salk. 733. the Pleadings. 2 Ld. Raym. 909. S. C. (*a*) Comyns 133. S. C.]

1 Salk. 26. Case lies against the defendant, where he enters on a thing agreed on, and doth not perform it.

IN an action on the case against the defendant for his negligence in performing what he had undertaken to do; there was a verdict for the plaintiff, and it being objected in arrest of judgment, that in this case there was no consideration to entitle the plaintiff to an action, for the defendant was to have no award; and it did not appear, that he was a *common carrier or porter*, so that by custom or usage he might lawfully claim a reward. *Holt*, Chief Justice, in arguing this matter, declared, That if the agreement had been only executory, (*i. e.*) if the defendant had assumed to take up the hogshead of brandy out of one cellar, and lay it down in another, (which was this case,) and had not done it, this action would not have laid against him, like the case in 11 *H.* 4. 33. when the action was brought against the defendant, upon a promise to build a house for the plaintiff by such a day, which he had not done; it was held, that the action would not lie, for the reason before mentioned; but that differs from the principal case, because the defendant had actually entered upon the performance of the thing which he had promised to perform, and the plaintiff relying on the defendant's promise, had trusted him to do it, who by his negligence had deceived him, and it is the *deceit* which is the ground of this action; it is true, the defendant was not bound to enter upon this trust, but if he doth, he must take care that the plaintiff be not damnified by his neglect. He admitted, that there was a contrary resolution * in *Yelv.* (*viz.*) That if *W. R.* deliver goods to *L. R.*, and in consideration thereof he promise to redeliver them; yet no action will lie against him, if he doth not redeliver them; which resolution is not law. That in † 2 *Cro.* it was otherwise resolved, (*viz.*) where money was delivered to one to pay over to another *sine mora*. Adjudged, that an action would lie against the defendant, if he did not pay it over; for though he had no benefit by this undertaking, yet, if he take the trust upon him, he is bound to perform it. See 3 *H.* 6. 36. *Owen* 141. *Keilw.* 160. He likewise held, that where a man carrying goods is of a public employment; as a *carrier*, *wharf-*

* Yelv. 128.

† 2 Cro. 667.

(*a*) *Vide* the report in Ld. *Raym.* discussed at large. *Vide* also *Jones* on Bailments. where the whole law of bailment is

inger, *hoy-man*, or *master of a ship*, he must answer all events, excepting only the *acts of God*, and *the enemies of the king*, and that this is a politic establishment, for the safety of all persons concerned, and whose affairs necessitate them to entrust such carriers; for by this means all private combinations between them and *highwaymen*, and other robbers, are prevented, which cannot easily be discovered. But if a bailiff or factor carries goods, and is robbed, he is not liable to the owner, though he hath a *premium*, because it is only a particular office, and a private trust; he doth the best he can, and it would be unreasonable to charge him with a trust farther than the nature of the thing puts it in his power to perform. The same law of a *factor*: Therefore if he is robbed, he shall not be chargeable, for it is sufficient, if he takes the same care that the owner himself would have done. But where goods are delivered to be carried *gratis*, or to do any thing about them, without any reward, which is called by *Bracton*,* *mandatum*, and in *English*, *acting by commission*; this also obliges him to a diligent management and care of the goods, which is implied in the very undertaking; and though the *trust was voluntary*, yet by the breach thereof, a fraud is put upon the deliverer, which is a sufficient ground to support this action.

[12]

*Lib. 3. 100.

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8. BIRD *v.* STROUD.

[Trin. 8 Will. 3. B. R.]

Where the action is grounded on the possession, the plaintiff needs not shew a title (S. C. Comyns 7. 4 Mod. 414, 418. 12 Mod 97. Skin. 621. Comb. 370.)

CASE, &c. in which the plaintiff declared, That he being *possessed* of a tenement, (to which he had and ought to have a way,) and to which he had, and ought to have, common of pasture in *D.*, the defendant had digged *coney-boroughs* there, *per quod*, &c. Upon demurrer to this declaration, the defendant had judgment in *C. B.*, and now upon a writ of error in *B. R.* that judgment was affirmed: The objection was, That the plaintiff had not shewed any title to this *common*, either by *grant or prescription*, and adjudged he need not, because the action is grounded upon the * possession, and it doth not appear but that the defendant is a mere stranger; besides the title is not *traversable*, but to be given in evidence upon the trial of the issue (*a*).

*2 Cro. 43, 122. Cro. Car. Sands ver. Trefusis. 1 Vent. 256. S. P. Cro. El. 335.

(*a*) *Vide Str* 5. 3 *Wils.* 456. 2 *Bl. R.* 817, 926. *Comyns*, Action for Disturbance B. Pleader C. 39.

9. BUXENTINE *v.* SHARP.

[Pasch. 8 Will. 3. B. R. 2 Salk. 662. S. C. 1 Ld. Raym. 169. cited. 2 Stra. 1264. S. P.]

Action will not lie for keeping a mad bull without saying sci-enter.

THE plaintiff declared, That the defendant kept a *bull* which used to run at men, but did not say *sciens* or *scienter;* and this was adjudged ill after a verdict, because the action will not lie, unless the owner knew the quality of his bull, and it cannot be intended that this was proved at the trial, because the plaintiff is not bound to prove more than is laid in his declaration.

10. JENKINS *v.* TURNER.

[1 Ld. Raym. 109. S. C. Salk. 662. S. C.]

Case against the defendant for keeping a boar which used to bite animalia, not saying what animals, good.

THE plaintiff declared, That the defendant kept a *boar, ad mordendum animalia consuet',* and that he knew of this quality; after a verdict for the plaintiff, and a motion in arrest of judgment, this declaration was held good, though it was objected, that *animalia* mentioned in the declaration might be *frogs;* for it shall be intended the proof at the trial was, that this boar bit such *animals* as will support the action, otherwise the jury would not have found a verdict for the plaintiff, and have given damages. There was another objection to this declaration, (*viz.*) That the defendant cannot know what *animals* he is to defend against; but it was answered, no evidence could be given of killing or biting any *animals* but of such of which he had *notice.*

11. CROWTHER *v.* OLDFIELD.

[Pasch. 2 Annæ. Rot. 233. B. R. 2 Ld. Raym. 1225. S. C. 1 Salk. 170, 364. S. C.]

6 Mod. 19.
1 Lutw. 126.
1 Salk. 364.

Where a copyhold is pleaded, the omission of the words tent' ad voluntatem domini, makes it ill.

CASE, &c. for disturbing him in his *common,* in which the plaintiff declared, that he was seised of a messuage, &c. parcel of the manor of *W. tent' per copiam rotulorum curiæ ejusdem manerii ut tenen' custumarius in feodo simplici secundu' consuetudinem manerii,* and that he and all the tenants of the said manor, had, time out of mind, *common* on the wastes of the said manor, for all beasts *levant and couchant* upon their copyholds. This declaration was adjudged ill after a *verdict* which had found it to be *parcel of the manor,* as the plaintiff had set forth in his declara-

tion, because the words *ad voluntatem domini* being left out, it doth not appear to be *copyhold;* so that taking it to be *freehold* and not *copyhold*, then the *prescription* should have been by a *que estate* at common law, in his own name, and not in the name of the lord. In arguing this case, *Holt*, Chief Justice, said, that a copyholder hath right of common, either as *belonging to his estate*, or to his *land;* that where it belongs to his *estate*, and as such he claims common in the lord's waste, there, if the copyhold is infranchised, the common is lost and extinguished, for that continues when the *estate* is gone: the other *common* is as *belonging to his land*, (*viz.*) where a copyholder hath common in the wastes of another manor, in that case the common is not lost by an infranchisement of the copyhold, because though the *estate* is gone, the *land* still continues. It was argued for the plaintiff in the original action, that this [14] title set forth in his declaration (admitting it to be bad) ought to be recited as unnecessary and surplusage, and the rather, because there was no occasion for him to set forth any title; he had the *possession*, that is sufficient against the defendant, who was a stranger and wrong-doer, which is very true; but if he will set forth a title, as he had done in this case, and that title is inconsistent in itself, a verdict will not help it; now here he could have no title as a copyholder, because it doth not appear that he held *ad voluntatem domini*, and he could have none as a *freeholder*, because he had prescribed *in the manor*, so that his title being absurd and inconsistent, the declaration must be ill; and for that reason the judgment in *C. B.* was now affirmed in *B. R.* for defendant in error (*a*).

(*a*) It appears contra, by the reports in 1 *Salk*. and Ld. *Raymond*, that the judgment in *C. B.* was reversed.

12. SMITH *v.* ARY.

[Hill. 2 Annæ. B. R. 2 Ld. Raym. 1034. S. C.]

Postea. Gaming. (1.) 6 Mod. 128. Indebitatus assumpsit will not lie for money won at play. Holt 329. S. C.

THE plaintiff declared, that in consideration he had agreed and promised the defendant to play at such a game, and to pay what he lost, the defendant promised to play, &c. and to pay, &c. and sets forth, that they played, &c. and that the defendant lost so much, which he had not paid; *cumque etiam*, he (the plaintiff) had won so much money *ad ludum pred'*, the defendant in consideration *inde*, promised to pay, &c. Upon a demurrer (*b*) to this declaration, it was insisted for the plaintiff, that the

(*b*) It appears by the report in Ld. *Raymond*, that this was decided on a motion in arrest of judgment.

mutual promises in the first count must be understood as if repeated in the second, (*viz.*) that the playing was upon the same agreement, being alleged to be won, *ad ludum pred'*. *Sed per Curiam*, the second count is not the better for the first, for they are separate and distinct, so that the agreement laid in the first will not go to the second; and that an *indebitatus assumpsit* will not lie for money won *at play*, so there was nothing but * mutual promises, and debt will not lie upon a promise, nor by consequence an *indebitatus*, but there must be a consideration, or a *quid pro quo*, *&c.*

* Hob. 18, 88. 1 Vent. 51, 44, 96, 153. Hard. 486. 3 Lev. 118.

13. ROE *v.* HAUGH.

[Pasch. 9 Will. 3. in Camera Scaccarii. S. C. 1 Salk. 29.]

What shall be mutual promises after a verdict.

THE case was, *B.* was indebted to *A.* in 42 *l.*; and *C.* in consideration that *A.* would accept him to be his debtor for the 42 *l.* due to the said *A.* by and from *B.* *super se assumpsit & eidem A. fideliter promisit quod ipse easdem* 42 *l.* would pay to him. And an *assumpsit* was brought against *C.*, averring him *fore debitorem ipsius A.*, without saying, that *B. was discharged;* and upon *non assumpsit* there was a verdict for the plaintiff in *B. R.*, and which was afterwards affirmed in the *Exchequer Chamber*, for being after a verdict, they held they ought to do what they could to help it; and therefore not taking it as a promise only on the part of *C.*, because as such, it could not bind him, unless *B. was discharged*, they construed it to be a mutual promise, *viz.* that *C. promised A. to pay the debt*, and in consideration thereof, *A. promised to discharge B.*

[15]

14. BUTCHER *v.* ANDREWS.

[2 Salk. 731. The Pleadings.]

1 Salk. 23. S. C. Where an action is brought for more than the defendant promised to pay, it is not good.

IN *assumpsit* the case was, the father was bound by his promise to pay the plaintiff so much money as he should lend the son, and for such goods as he (the plaintiff) should let the son have, so as the money lent, and the goods sold and delivered to him (the son) *did not exceed* 5 *l.* The action was brought for 5 *l.* *money lent*, and likewise for 5 *l.* *being the value of the goods sold and delivered*, and likewise for so much money *mutuo dat' & accommodat'* to the son at the father's request. Upon *non assumpsit pleaded*, the plaintiff had a verdict, and 3 *l.* *damages:* But upon a motion in arrest of judgment, this verdict was set aside; for it is plain,

the defendant would not be indebted for more *than* 5 *l.*, because he engaged for no more, and if the jury had given more it had been naught; it is true, they gave but 3 *l.* *damages*, but yet that will not help the declaration, which was for 5 *l.* *money lent, and for* 5*l.* *the value of the goods delivered*, and it doth not appear to the Court, but that the defendant hath paid 5 *l.* already; and this now claimed is over and above.

15. BOURKMIRE *v.* DARNELL.

[Mich. 3 Annæ.]

1 Salk. 27. S. C. 6 Mod. C. 248. Where there is a collateral undertaking for the act of another, it must be in writing. See antea, Smith versus Westhall.

ASSUMPSIT, *&c.* in which the plaintiff declared, that the defendant in consideration he, (the plaintiff,) at the instance and request of the defendant, would lend and deliver to one *Joseph English unum spadonem* of him the said plaintiff, to ride to *Reading in Berkshire*; he (the defendant) *assumpsit*, and promised to the plaintiff, that the said *Joseph* should re-deliver the said gelding safely to him the plaintiff. Upon *non assumpsit* pleaded, the evidence at the trial was, that the said *Joseph English* would have hired the gelding of the plaintiff, but could not prevail with him till the defendant came, and did undertake for the re-delivery; upon which the counsel for the defendant insisted, that the plaintiff ought to produce a *note in writing* of this agreement, which being over-ruled, there was a verdict for the plaintiff; and it was moved in arrest of judgment, and *per Curiam* adjudged, that it was void by the * statute of *frauds*, because it was a collateral undertaking for the act of another, and in such case the statute requires, that it must be in writing. The difference is, where the *whole credit is given to the undertaker*, in such case the third person is in nature of a servant, and there is no remedy against him; it is true, the undertaking is good, but it is not within the statute, and therefore not requisite it should be in writing; but where the undertaker comes in aid only to procure or obtain credit for another, so that the remedy may be against both, this is a collateral undertaking for another, and made void by the statute if it is not in writing. *Et per Curiam*, In the principal case the plaintiff may maintain an action of *detinue* against *Joseph English*, upon the original delivery of the gelding; and therefore this promise, made by the defendant, was to answer for the act and default of another, for which reason the verdict was set aside.

[16]

* 29 Car. 2. cap. 3.

Vide 2 T. R. 80. Cowper 727.

16. HUTTON v. MANSELL.

[Pasch. 3 Annæ.]

CASE, &c. by a *feme sole*, in which she declared *quod cum* she had agreed and promised to marry the defendant, he in consideration thereof, promised to marry her. Upon *non assumpsit* pleaded, the cause was tried before *Holt*, Chief Justice, and the promise of the man was proved, but no actual promise on the woman's side, yet he held there was sufficient evidence to prove that the woman likewise promised, because she carried herself as one consenting and approving the promise of the man.

What shall be a sufficient evidence of a promise by feme sole to marry. (S. C. post. 64. 6 Mod. 172.)

17. SAVILE v. ROBERTS.

[10 Will. 3. at Guildhall, *coram* Holt, Chief Justice. 1 Ld. Raym. 374. S. C.]

CASE for causing and maliciously procuring the plaintiff to be indicted for a riot. It was held by *Holt*, Chief Justice, it is not sufficient that the plaintiff prove he was innocent, but he must prove express *malice* in the defendant; he likewise held, that this action is not grounded upon the conspiracy, but upon the damage, and therefore the plaintiff must prove his damages, otherwise the action will not lie; but in a writ of conspiracy it is otherwise, and where such a writ is brought, if one is acquitted the other cannot be found guilty.

5 Mod. 394, 410. 1 Salk. 13. Case for causing the plaintiff to be maliciously indicted, &c. he must prove the malice and damages.

18. SHEER v. BROWN.

[17]

[Trin. 2 Annæ, B. R. 2 Ld. Raym. 899. S. C. 1 Salk. 26. S. C.]

INDEBITATUS assumpsit, in which the plaintiff declared, that the defendant being indebted to him for goods sold in so much money, in consideration thereof *super se assumpsit*, there was judgment by default, and upon a writ of error brought, it was objected, that the declaration is ill, because it did not set forth, that the *defendant* **promised*, and it might be a stranger: but *per Curiam*, it can never be intended, that a stranger promised, or that the plaintiff himself promised, and there is no other person in this record to promise, but only the defendant; it is true, if there had been *two* or more defendants, it might have been otherwise, because in such case it would

Indebitatus assumpsit, and did not say, that the defendant promised, held good.

*1 Lev. 164. Raym. 123. Sid. 246.

have been uncertain which of them had made the promise; and *per Gould*, Just. the difference is also between a collateral promise and a promise by operation of law: for in the latter case it is well, but not in the first. *See* 3. Cro. 913. Noy 50.

19. COLLEGE OF PHYSICIANS *v.* ROSE.

[Hill. 1703. B. R.]

6 Mod. 44. The prescribing what is fit for a patient in practising physic.

IN a special verdict, in an action on the case, the jury found, that *Rose* the defendant was an *apothecary*, and sent for by a sick person (of what distemper *non constat*); that he came to the patient, and being desired to send him something in order to his cure, he accordingly sent him some *bolus's*, and this being without any *license*, the question was, Whether it was practising as a physician? and *per Curiam*, It is, for the making up and compounding medicines is the business of an apothecary, but the judging what is proper for the cure, and advising what to take for that purpose, is the business of a physician; therefore let the distemper be what it will, the prescribing and advising what is fit for it, is the business of a physician, though without a fee, but that rarely happens; so the plaintiff had judgment, but it was reversed in the House of Peers.

20. ASHBY *v.* WHITE.

[Mich. 2 Annæ, 2 Ld. Raym. 938. S. C. 6 Mod. 45. S. C.]

1 Salk. 19. Case will not lie for hindering the plaintiff to vote at the election for a burgess to parliament.

[18]

CASE against the constables of *Ailesbury* in *Bucks*, for obstructing the plaintiff to *vote*, and for refusing to receive his vote at the election of *burgesses for that borough*, to serve in parliament; upon not guilty pleaded, the plaintiff had a verdict, and upon a motion in arrest of judgment, three judges held, that this action would not lie till the parliament had decided, whether the plaintiff had a *right to vote* as an elector (*a*).

But *Holt*, Ch. Just. was of a contrary opinion, *ss.* That the plaintiff had a right to vote, and that in consequence thereof the law gives him a remedy, if he is obstructed, and that this action is the proper remedy.

By the *common law of England*, every commoner hath a right not to be subjected to laws made without their consent, and because such consent cannot be given by

(*a*) Judgment for defendant reversed. 1 *Bro. P. C.* 45.

every individual man in person, by reason of number and confusion, therefore that power is lodged in their representatives, elected and chosen by them for that purpose, who are either *knights*, *citizens*, or *burgesses*.

That the election of *knights of shires* is by freeholders, and this is a right which they have in respect of their *freeholds*, arising from and inseparately incident to such *freeholds;* for before the statute of *H.* 7. every freeholder, though of never so small a value, had a right to vote at such elections; and though this was confined by that statute to freeholds of a certain value yet it is still a right, as it was at common law, and annexed to the estate, and therefore it is a real right or franchise.

As to *boroughs*, some are not *incorporate*, but are so by *prescription*, and their representatives are chosen by *burgesses*, who vote *ratione burgagii & ratione tenuræ*, and this like the case of a freeholder before-mentioned, is a *real right* annexed to the *tenure in burgage.*

In other *boroughs* which are incorporated and subsist by charter, the right of election is a personal right granted to the corporation, for the use and benefit of the members thereof; for though in point of *prender* it vests in the corporation only as an inheritance; yet *quoad* the exercise and enjoyment, it is distributively the personal right of every individual member of the corporate body, for they are persons who are represented, and therefore they are to pay the wages to the person whom they choose; and if they refuse, it is to be levied upon the respective members of the corporation.

And as this is a personal right, so it cannot be given but to a corporate body; and though my * Lord *Hobart* would have it good in a place incorporate, and this by way of ordinance, yet that is not law, and all the other judges were against him.

* 12 Rep. 120

The right of citizens to vote for their representatives is of the same nature and built upon the same foundation, and nowise different but in point of eminence, as cities are more worthy and eminent than boroughs.

This is a noble franchise and right, and therefore not without a remedy where it is opposed, for want of remedy and want of right are convertibles.

21. HARECOURT *v.* HASTINGS. [19]

[Pasch. 4 Will. 3.]

No advantage shall be taken to a declaration upon a plea in

IN an action on the case *for fees* and wages, the defendant pleaded in *abatement, et petit judicium de billa, & quod billa prædicta cassetur*, for incertainties in the declara-

abatement, the defendant ought to demur.

tion, and insisted upon many errors therein: *sed per Curiam*, it shall not be allowed for the defendant to take advantage of any errors in the declaration upon a *plea in abatement*, but he ought to demur, for he was ruled to answer over.

1 Vent. 260, 269.

Case, &c. against a *tailor*, in which the plaintiff declared, that he (the plaintiff) employed him to make a coat, and that he made it *tam inepte & inartificialiter*, that it was of no use to him; upon a demurrer to this declaration it was held naught, because *non constat*, wherein it was spoiled.

Ante, pa. 12.

Case, in which the plaintiff declared, that he being seised of such a close had a *way*, *&c.* and that the defendant *stopped it*, adjudged good, because possession is a good title against a wrong doer.

2 Vent. 78.

Case against a *carrier*, and declares for four silver cups *& uno poculo argenteo*, and not *uno alio poculo*, *&c.* adjudged good; for if it be *aliud*, the damages shall be intended to be given for it; if it be *idem & non aliud*, then it is only tautology, and in that case the damages may be rightly given.

22. BROOKS *v.* HAYNE.

Raym. 245. The defendant pleaded the statute 3 Jac. against an action brought by an attorney, that he had not given a bill of charges, and good.

THE plaintiff, who was an attorney, was employed by *T. S.* who made the defendant his executor, and died, and afterwards the plaintiff brought an *assumpsit* against this executor for several fees, and for so much money laid out in prosecuting and defending several suits at law for the testator; and sets forth, that he had demanded the money of the testator in his life-time, and of the executor since his death, and that neither the one nor the other had paid it, *&c.* The defendant pleaded the statute * 3 *Jac.* and that the plaintiff had not given the testator, or to this defendant, any bill of charges, according to that statute, before the action brought; and upon a demurrer to this plea, *per Curiam*, it was adjudged a good plea.

* Cap. 7. Vide 1 Salk 86. Bull. N. P. 145.

[20]

ADDITION.

1 Bulst. 296. * Cro. 183. Noy 32. 2 Leon. 183.

AN *addition* after the *alias dictus* is ill; as for instance, where the indictment was against *W. R. alias dictus W. R. de H.* for this is no addition.

For where the *præcipe* was *Richardo Joyner, civi & pannario London, alias dictus Richardus Joyner de London armiger*, adjudged, that without the *alias dictus*, there was no addition of the vill; and that if the party is not sufficiently named in the first part of the writ, the *alias* cannot aid or help it, because it is only to make the writ agree with the deed, but it is not material, for it is neither answerable, traversable, or issuable.

Et per Holt, Chief Justice, If *W. R.* of *Wilts*, commit felony at *Westminster*, he is always indicted by the name of *W. R. de Westmonast.* and the practice being always so, this may properly be said to be his addition.

Debt against *W. R. de H.* yeoman, *alias dictus W. R. de H.* son and heir of *R. R.*, and so charges him as heir; this was adjudged ill, because the writ doth not name him *heir* in the premises, but in the *alias dictus*.

Trespass against *W. R. de H.* chandler, the defendant pleaded in *abatement*, that he was a gentleman, and upon a demurrer to this plea it was adjudged ill, because he did not deny that he was a chandler; and if a gentleman exercise a trade, he may be called by the name of his trade, though he is a gentleman.

Cro. Eliz. 334, 884. Comyns, Abatement, F. 26.

2. THE EARL OF BANBURY *v.* WOOD.

[2 Ld. Raym. 987. S. C.]

IN a *homine replegiando*, the defendant pleaded *in abatement*, there was no addition of vill or place of abode in the writ, *&c.* and upon a demurrer to this plea, he was ruled to answer over; for, *per Curiam*, an addition is not necessary, because the *pluries replevin*, upon which the Court holds plea, is not the original writ, but the original writ is *vicontiel*, and no process of outlawry lies upon it, and therefore it is not within the statute; also since there is no addition in the first writ, there must be none in the *pluries*, for that must not vary, but pursue the first writ on which it was founded; and though the statute of *H.* 5. says, there shall be an addition in all original writs where exigent lies, yet that must be intended where proceedings are upon the first writ.

1 Salk. 5. Addition not necessary in a homine replegiando. Mod. Cas. 84. Cro. Eliz. 148. 1 Wils. 244. Comyns, Abatement, F. 24.

ADMINISTRATION.

To whom grantable. 1 Sid. 409. 2 Stra 891, 1111, 1118. 1 Ld. Raym. 684, 685, 686. 1 Wilson 168.

ADJUDGED, That administration of the goods of a *feme covert* ought to be granted to the *husband*, for he is the next and nearest friend; the care of the funeral belongs to him, and he might have recovered or released whatever belonged to her.

4 Rep. 51. Jones 175.

But if the wife was an executrix to another, then, as to the goods which she had in that capacity, administration must be granted to the next of kin to the testator (*a*).

Allen 36. Stiles 45, 74.

Where there is a *brother and sister of the half blood*, administration may be granted to the *sister*, because she is in equal degree of kindred; but if the sister is married, then it must be granted *to the brother*, and not to her and her husband, because in effect it makes the husband administrator, who is not of kin to the intestate, and if she die the husband would still continue administrator, and so might possess himself of the whole personal estate, which is contrary to the *statute.

*21 H. 8. Vide Str. 956.

Where an executor *refuses*, or dies before probate, administration shall be granted to the next of kin of the intestate *cum testamento annex'*, unless there is a *residuary legatee*, and then it must be granted to him.

Jones 125.

The husband made his wife executrix, and gave her the residue of his *moveable goods and chattels;* now if the *wife die before probate*, administration must be granted to the *next of kin to the husband*, because the whole *residuum* was not given to the wife; but if the whole had been given to her (*viz.*) all his debts, goods, and chattels whatsoever, then administration might be granted to the next of kin of the wife, because she was made a *residuary* legatee of the whole.

Repeal. Sid. 372, 179, 293. Jones 262. Raym. 43, 93. 1 Mod. 230. 2 Ld. Raym. 1216.

At common law the ordinary might repeal an administration at pleasure, but now since the *statute* 21 *H.* 8. when once it is duly granted according to the statute, it cannot be repealed, for his power is then executed; but if it is not duly granted according to the statute, as for instance, if granted to a wrong person, in such case he may repeal it and grant it to another, for he hath not executed his power. *Sed nota*, If the administration is repealed for want of form in the grant, in such case the or-

(*a*) In this case the administration is not of the goods of the wife, but *de bonis non* of her testator.

dinary must regrant it to the same person, though there are others in equal degree.

[22]

Where an administration is repealed, because it should be granted to another, in such case all acts of the first administrator stand good; but if it is repealed because there is a lawful executor, then all his acts are void.

3 Cro. 460. Raym. 224. Vent 303. 6 Co. 18. b. 1 Salk. 38. Plowd. 280. 2 Lev. 183.

Where a will is of lands and goods, the Court may repeal upon an appeal; but where it is of lands only they cannot, because there they had no authority to prove, and by consequence had no authority to repeal.

SIR GEORGE SAND'S CASE.

SIR *George Sands* administered to his son, and afterwards a woman pretending to be his wife, sued for a repeal, but a prohibition was granted, because the ordinary had an election to grant it either to the father or wife, and had executed his power by granting it to the father, *per Holt*, Chief Justice.

Raym. 93. Sid. 179, 403. Where the ordinary hath a power and executes it, it shall not be repealed. Vide 1 Salk. 36.

But where a feme covert died intestate, and the next of kin to her obtained administration, and the husband sued for a repeal, a prohibition was denied *per Holt*, Chief Justice, because in this case the ordinary had no power or election to grant it to any person but to the husband; and this is not within the statute of *H.* 8., but within the statute of *Ed.* 3.

1 Show. 351. 1 Vern. 315.

Upon this issue the defendant cannot give in evidence a judgment not satisfied, because it is an administration of another nature than he had pleaded.

Of pleading plene administravit. Clay. 165. 1 Wilson 4. Allen 42. 1 Salk. 316. 3 Lev. 28.

Payment of debts *pendente brevi* is no evidence upon this issue, for the plea is *plene administravit* in the *præter*-tense, and this evidence proves an administration only since the purchase of the writ, and therefore the defendant must plead it specially.

In a *scire facias*, upon a judgment against the testator, if the defendant plead *plene administravit*, it is ill upon a special demurrer; because, by the plea, the defendant admits that goods came to his hands, and therefore he ought to shew how he administered, that it may appear it was not in paying of debts of an *inferior nature*, and this is in favor of judgments; but upon a general demurrer such a plea may be good, because the defendant might have paid other judgments, and so shall his plea (which is confessed by the demurrer) be intended.

Allen 47. 3 Cro. 570. contra. Vide 3 Wms. 117.

1 Salk. 296. Ld. Raym. 3. 4 Mod. 296.

Nota, The proper plea in this case is *riens inter maines* at the time of the testator's death.

Moor 858.

SLATER *v.* MAY.

[Mich. 3 Annæ. B. R. 2 Ld. Raym. 1071. S. C. 6 Mod. 304. S. C. 3 Danv. Abr. 351. pl. 4. 1 Salk. 42.]

Action by an administrator, during the absence of the executor, he must aver the executor is absent.

ADMINISTRATOR, *durante absentia W. R.* executor, brought an action of debt upon a bond, but did not aver where *W. R.* was absent, or that he was absent; *per Curiam*, It is reasonable the ordinary should have power to grant administration in this case, and such administrator is accountable to the executor, and we will intend him beyond sea, but absence should have been averred in this case.

ADMIRALTY.

1. ANONYMOUS.

[Hill. 13 Will. 3. 1 Ld. Raym. 639. S. C.]

Seamen lose their wages where the ship is lost before she comes to a port. * Sid. 129. 12 Mod. 442. Doug. 520. Molloy, b. 2. s. 710. 1 Sid. 179. 3 Bur. 1884.

UPON a prohibition to a suit in the Admiralty for mariner's wages, it was held, *per Holt*, Chief Justice, that if a ship is * lost *before* she arrives to any *port of delivery*, the seamen lose all their wages; but if she is lost *after* she comes to a *port of delivery*, then they only lose their wages from the last port of delivery: But if they run away, though after they come to a port of delivery, they lose all their wages.

2. KING *v.* PERRY.

[Pasch. 1 Will. 3.]

Where an obligation is suable in the Admiralty, and where not. 4 Inst. 139.

PER Holt, Chief Justice, an obligation taken in the Admiralty to appear and sue there, is suable in that Court, for it is a *stipulation* in nature of bail at common law: But where there were 13 *part owners of a ship*, and one of them refused to let her go to sea, whereupon a *stipulation* was taken for the share of the party re-

fusing, and afterwards the ship went her voyage; and this stipulation being put in the Court, a prohibition was granted (a), because the building the ship and the charter-party were at land.

[24] Adjudged, That where a master pawns the ship at sea, the Admiralty hath a jurisdiction; and *nota*, he may pawn to relieve the ship in extremity, for he being constituted master of the ship, hath implicitly a power to preserve it in cases of danger; but he cannot pawn it for his own debt, because he has neither a property or power for that purpose; and if the Admiralty should confirm an *hypothecation* of that nature, a prohibition shall be granted.

Hob. 12. Moor 918. Where a master may pawn a ship, and where not. Vide Str. 695. 1 Ld. Raym. 152, 805. 1 Vez. 155, 442. 1 Salk. 34. Comyns, Adm. E. 10.

If a man give bond at sea for a debt contracted at land, the Admiralty have no jurisdiction, for one thing must not only be done at sea, but the whole must concur to give them jurisdiction; so if a debt is contracted at sea, and a bond given for that debt at land; so if there be a contract at land and a breach at sea, in these and the like cases the common law shall be preferred.

Hob. 212. 4 Inst. 139. 1 Roll. 529. 1 Vent. 32.

(a) *Vide ac. Carth.* 26. *Comb.* 109. 235. *Vide* 2 Ld. *Raymond*, 1285. *Str Holt*, 647. *R. contra* 1 Ld. *Raym.* 223, 890. 1 *Wils.* 101.

ADVOWSON.

I. THE KING *v.* BISHOP OF CHESTER, & AL'.

1 Ld. Raym. 292. Skin. 651.

IN a *quare impedit*, &c. it was held by *Holt*, Chief Justice, to which the Court agreed, that where an *advowson is appendant to a manor*, and the owner mortgages the *manor* in fee, excepting the advowson, that by this means it is become *in gross*; but if the money be paid punctually at the day, then it becomes *appendant* again, and if it is paid after the day, it is appendant in *reputation*, and may pass by the name of an advowson appendant in grant or other conveyance, though in reality the appendancy is destroyed; for if it is severed one instant from the manor, by the act of the party, it is then gross, and not appendant.

2 Salk. 560. 5 Mod. 297. Where an advowson is in gross, and where it is appendant again. Vide 1 Ld. Raym. 198.

So where the owner of a manor, to which an advowson was appendant, accepts a fine of the advowson, with a

Comyns, Advowson, B.

grant and render back of every second turn; now for such turn the advowson is in gross, but for other turns the appendancy still continues: But if a man levy a fine of the [25] advowson, and accepts a grant and render of every other turn, the appendancy is quite gone, because there was an instant of time in which it became severed.

Co. Lit. 122.

So where there are two coparceners of a manor, to which an advowson is appendant, and they make partition of the manor, without taking notice of the advowson, at every other turn it is still appendant; but if there had been any express exception of the advowson, it would then be in gross.

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2. REYNOLDS v. BLAKE.

[Pasch. 9 Will. 3. in C. B.]

Postea, tit. Appertaining, S. C. Where an advowson appendant to a manor is become in gross. 1 Ld. Raym. 197. S. C. 1 Leon. 204.

IN a *quare impedit*, it was the opinion of the Court, that where there are *two coparceners of a manor*, to which an advowson is appendant, and the whole demesnes are allotted to one, and the services to another, by this means the manor is destroyed, and the advowson becomes in gross; but if one of them die without issue, so that the demesnes descend to him who hath the services, the manor is now revived, and the advowson is appendant again, because this was a severance by act of law. *See* 17 *Ed.* 3. 38. 12 *H.* 7. 5. 8 *Rep.* 79. 1 *Inst.* 122. *Bro. Quare Imp.* 118 (*a*).

(*a*) This was not the point in the cause.

ALEHOUSES.

1. ANONYMOUS.

An indictment will not lie where a statute creates an offence, and appoints the punishment. Postea the King

THE defendant was indicted for keeping a *tippling-house* without license, *contra formam statut'*: Upon not guilty pleaded, he was found guilty; and it was insisted in arrest of judgment, that at common law any person might keep an *alehouse* in a fit and convenient place for

that purpose; that this was a statutable offence, and the penalty by the statute is, *that the offender shall be committed by two justices*, and a recognizance taken of him, with two sureties, not to sell ale, &c. and that this being the punishment by the statute, for that reason † an indictment will not lie; and the Court * being of this opinion, judgment was staid, though an express ‡ case was cited to the contrary.

v. Edwards, that it will not lie. 1 Salk. 45.

† Palm. 383. 2 Roll. Rep. 398. 2 Cro. 643.

[* 26]

‡ 1 Mod. 34.

2. STEPHEN WATSON'S *CASE*.

[Mich. 13 Will. 3.]

THE same point came in question again in *Stephen Watson's* case, which is imperfectly reported in || 1 *Salk.* by the name of *Stevens* versus *Watkins*, the case was thus:

|| 1 Salk. 45.

Steven Watkins was indicted at the quarter-sessions, for that he, on the first day of *October*, *anno* 10 *Will.* 3. and at divers other days and times at *B.* &c. without *any licence* from two justices of the peace, did keep an alehouse, and sold ale and beer there *contra pacem & contra formam statut'*; upon a demurrer to this indictment it was insisted,

1. That an indictment would not lie in this case.
2. That admitting it would lie, yet not at the sessions.
3. But admitting that it would lie, and at the sessions, yet this indictment is ill in form.

First, This indictment must be either upon the statute * 5 & 6 *Ed.* or upon the statute † 3 *Car.* 1. and both these statutes prescribe another method of punishing this offence, which was made so by one or both of them, and that ‡ method and no other must be followed, and if so, then an *indictment* will not lie.

* Cap. 25

† Cap. 3.

‡ 2 Cro. 643. Castle's case. 1 Roll. Rep. 390

(2. *Point.*) But admitting it will lie, yet not at the sessions; for this is not an indictment upon the statute 4 *Jac.* 1. *cap.* 4. for selling ale by the barrel without licence, for in that case, by the very words of the statute, an indictment will lie at the sessions; but this is an indictment upon one of the statutes before mentioned, and neither of them give the sessions any power in this case, and they have no power, but what is expressly given them by the statute.

(3. *Point.*) But this indictment is naught in form, for the caption is, that it was presented by the oath of twelve men sworn and charged, without saying, § *adtunc & ibidem jurat' & onerat'*, and thereupon it was adjourned; but afterwards, in *Mich.* 13 *Will.* 3. it was adjudged, that this indictment would not lie, because it was a new offence created by the statute, and a particular method of punishing the offender was appointed by the statute, which should be followed, and no other.

§ 1 Vent. 60.

3. THE KING v. RANDALL.

2 Salk. 470. S.C. Sessions cannot suppress an alehouse licensed by two justices, unless it is for disorder.

THERE is a short note of this case in 2 *Salk.*; but the case was as followeth, (*viz.*) two orders were removed by *certiorari* in *B. R.*, which orders were made at the sessions in *Middlesex*, the first whereof recites, that whereas *R. Randall* had lately taken a house at *Hogsden*, designing to *sell ale and beer* there; and whereas the house had never been inhabited by other persons than merchants and persons of quality, and there were alehouses enough in *Hogsden* already, therefore it is ordered, that no *licence* be granted to any house there, wherein ale was not formerly sold; and that no *licence* should be given to *Randall*; the other recites, that whereas a *licence* was surreptitiously obtained by *Randall* from *two justices*, to sell ale there, &c. that yet he should be suppressed, &c. from drawing ale there, &c. And now it was moved to quash these orders, because by the statute 5 & 6 *Ed.* 6. the quarter-sessions cannot controul the authority of two justices in this matter; *et per Holt*, Ch. Just. This difference hath been taken, (*viz.*) where an authority is given to two justices to do a thing, and from which there lies no appeal, there it may be commenced and done in the sessions; but if an appeal is given, then the sessions hath not an original jurisdiction, it must not be begun there; as for instance *per* 18 *Eliz.* and 43 *Eliz.* till the statute 3 *Car.* 1. But here the question is, Whether the sessions can suppress an alehouse licensed by two justices of the peace? and adjudged they could not, except it is for disorders committed, and thereupon these orders were quashed.

5 & 6 Ed. 6. cap. 25.

4. THE KING v. EDWARDS.

*Mod. Cases 86. Ante Stephen Watson's Case 26.

THE question*, Whether an *indictment* would lie for selling ale without a *licence*, was again stirred, nothwithstanding the resolution in *Stephen Watkins's* case before mentioned; and two judges were of opinion that it would not lie; but *per Holt*, Ch. Just. an indictment is more beneficial for the subject, because it is a summary way of proceeding; and therefore it seems reasonable that it should lie in this case, notwithstanding it is an offence created by the statute, and a particular punishment thereby directed; and so it hath been adjudged in a parallel case; as for † instance, it is prohibited by the statute 22 *Car.* 2. to travel with a waggon drawn with more than five horses at length, this is a new law, and it is a new offence to transgress it; but yet an indictment will lie against the offender, though a particular punishment is directed by that very statute which created the offence.

† 4 Mod. 144.

[28]

ALIEN. See Discent per Totam. See Trial 2.

PROGERS *v.* ARTHUR.

[Pasch. 5 Will. 3. B. R. Rot. 531.]

INDEBITATUS assumpsit, the defendant pleaded, that the plaintiff was an *alien enemy*, born at *Roan* in *France*, under the allegiance of, &c. The plaintiff replied, that he was born at *Hamburgh*, under the allegiance of the *emperor*, *a friend of the king*, &c. and *traversed*, that he was born at *Roan* in *France*, &c. to which replication the defendant demurred; and had judgment, because by the *traverse Roan* is parcel of the issue, which is very immaterial, it being too strait; and instead thereof the plaintiff should have traversed, that he was born under the allegiance of the *French* king: *Nota tamen*, in a case between *Groddeck* and *Briggs*, which was debt for an escape, the defendant pleaded that the plaintiff was an alien enemy, born at *Roan* in *France*, under the allegiance of the *French* king, &c. and the plaintiff replied, that he was a natural subject, born at *Westminster* in the county of *Middlesex*; and traversed that he was born in *France*; and upon demurrer the Court held this to be an immaterial traverse, for the plaintiff should have rested, and tendered an issue upon his being born at *Westminster*.

When a traverse makes issue too strait. 2 Stra. 1082. 1 Salk. 46. Fost. 186.

Jones 261.

The capacity of an alien may be considered, either in references to inheritances and to freeholds, or to goods and chattels, as to *inheritances*, &c. an alien may purchase by his own account or contract, though he cannot retain against the king, but he cannot take a freehold by action in law, therefore he cannot be a tenant by the courtesy; nor an alien woman be tenant in dower; for the law doth nothing in vain, therefore it will not give him or her a freehold in the cases before-mentioned, because they cannot keep it.

1 Vent. 417. Co. Lit. 316.

[29]

Chattels are either *real or personal*, now an alien is not capable of a *chattel real*; as for instance, of a *lease of lands*; but an alien merchant may take a lease of a house to dwell in, as incident to trade and commerce, but he is not capable of chattels personal.

Hob. 148. 1 And 20. Golds. 29. 1 Leon. 47. 4 Leon. 82. Sid. 417. Co. Lit. 31. b.

At common law, a lease made to an alien artificer, either of a *house* or shop, was good between the parties, but forfeitable to the king; but now, if a *shop is let to an *alien artificer*, the lease is void by the statute 32 *H.* 8. and if the lessor brings an action of debt for rent, the lessee may plead this statute in bar to this action; but if a house or shop is let to an *alien gentleman*, the lease is not void within that statute, neither is it pleadable in bar to an action.

*1 Sand. 7. Sid. 308. Vide Harg. Co. Lit. 2. b. note 7.

AMENDMENT. See Variance.

AMENDMENTS are usually made *in affirmance of judgments*, and seldom or never to reverse or destroy them: By the statute of **Marlbridge* it is enacted, that *de cætero fines non capiantur pro pulchre placitando*, (*i. e.*) for leave to amend vitious and bad pleadings, *&c.;* from which it may be observed, that there were amendments at common law, but then the party was to pay a fine for leave to amend, like a fine *pro licentia concordani;* for he was to be amerced for ill pleading, which amercement was due to the king; and that being now taken away by this statute, it seems reasonable that the party should pay *costs* upon an amendment.

Cap. 11.

There are but two statutes of amendments, (*viz.*) 14 *Ed.* 3. and 8 *H.* 6.; the one extends to process out of the *roll*, (*i. e.*) to writs which issue out of the record, and not to proceedings on the roll itself; and this last statute hath always been construed in imitation of the first, the intent of it being to amend in matters precedent to the judgment and to support the judgment itself, and to avoid writs of error.

1 Salk. 51.

The statute 16 & 17 Car. 2. is in the nature of a statute of *jeofailes;* it extends only to superior courts, and to the courts of counties palatine (*a*), and that only after verdict; unless in some particular cases; by this statute all defects are amendable after verdict, which do not alter the merits of the cause, nor the nature of the trial and issue.

Vide Gilb. C. B. 112.

[30]

(*a*) *Vide St.* 5 *G.* c. 13.

Therefore where the matter of the suit is not actionable, the judgment shall be arrested; so likewise where there is a cause of suit, but the plaintiff hath took a wrong remedy; as for instance, if he bring an action on the case for words, which are not actionable; if he bring an action of debt upon a bond before it is due, or debt for rent before it is in arrear; so if he bring *covenant*, and doth not assign a sufficient breach, or *assumpsit*, and doth not shew a sufficient consideration, these are not helped by the verdict.

Vide Gilb. C. B. 121.

At common law *original writs* were not amendable, because coming out of another court, they are not subject to be corrected by *B. R.*; but, in the case of the king, they might be amended in Chancery.

But now by the statute 8 *H.* 6. the Court may amend any fault in an original or judicial writ, if it is the misprision of the clerk.

Thus if the cursitor hath instructions to make out a writ against *W. R. generosum*, and instead of that he names him *militem*, this mistake is amendable, for it must be imputed to his negligence or oversight: but if he is named *generosus*, in the original, when it should be *miles*, and the cursitor had no such direction, this cannot be amended, because it is not his fault, but the neglect of true information by the party himself.

8 Rep. 156 Blackmore's case. Hob. 129.

If an original is *præcipe quod solvit*, instead of *præcipe quod reddat*, or *hos breve* for *hoc breve*, it is not amendable by the statute 8 *H.* 6. because this must be imputed to the ignorance of the cursitor; it makes the writ without due form which is required by law, for *forma dat esse rei*, and prevents confusion.

8 Rep. 159.

But by the later authorities, *false Latin* is amendable, as in waste, if the writ is * *destrictio* instead of *destructio*, so *hos breve* for *hoc breve* or *debet* for *debeant*.

2 Saund. 39. 2 Vent. 171. * 2 Vent. 173. 4 Rep. 44.

So debt in the *debet* when it should be in the *detinet*, *per stat.* 16 *Car.* 2. amendable and want of pledges, in a suit by original, because it is only matter of form, by which neither the right of the cause or the nature of the trial is altered; the like where the suit is by bill.

Sid. 379, 421

The omission of *vi & armis & contra pacem* was formerly held fatal, even after a verdict, for it was held to be matter of substance, because it brings a fine to the king, but now it is amendable by the last statute: so is the omission of a *profert hic in curia* after a verdict, but not upon a demurrer.

And by the same statute an omission of a *capiatur* or *misericordia* shall be amended, and so it is if a *capiatur* be entered * instead of a *misericordia;* so where an action is brought by *Thomas*, and the judgment was *quod Johannes recuperet*, this is amendable, for the mistake is only of the

* 5 Saund. 308, 402. Sid. 70, 143.

[31]

name, which before was right in the record; and by the statute, no fault shall impede the judgment which doth not affect the merits of the cause, or the right of the party.

2. GREENWOOD v. PIGGOTT.

[Trin. 7 Will. 3. B. R.]

Where the nisi prius roll shall be amended by the plea roll.
* 3 Cro. 435.
8 Rep. 161.
2 Cro. 441, 587, 157, 627.
Skin. 591.
Str. 551.

TRESPASS for an assault and battery; the defendant pleaded *son assault demesne*, the plaintiff replies, *de son tort demesne absque tali causa & de hoc ponit se super patriam & prædict* * *Edwardus* (which was the plaintiff's name) *similiter*, when it should have been the defendant's name; the original, the issue and the *nisi prius roll*, had both this mistake, but the *plea roll* was right. Adjudged, that it should be amended.

3. SAUNDERS v. LENOIR.

[Mich. 1 Annæ, B. R.]

A record shall not be amended by the draught below.

IN a writ of error, upon a judgment in the court at *Northampton*, the record removed being *præceptum fuit*, instead of *præceptum est*, in the *venire*, and *messes* instead of *misis;* the draught below was right, it being drawn by the clerk and perused by counsel; and now upon a motion to amend the record by the draught (which the clerk swore to be right below) it was denied, because it was no more than a private paper in their own custody, of which this Court could not take any notice; and if this was done by contrivance (as alleged) the defendant might bring his action.

Vide Rep. B. R. temp. Hard. 205.

4. ANONYMOUS.

[Pasch. 7 Will. 3.]

Whilst all is in paper, it is not within the statutes of amendments.
Gilb. C. B. 143.

RULED, That whilst the declaration is in *paper*, the Court may give leave to amend any thing in it at pleasure, because in such case it is not within the statutes of *amendments;* but when once it comes in parchment the Court can give leave to amend no farther than is allowed by the statute, for it is then a record, and ought not to be dashed or obliterated.

Nota, After a demurrer only given, but not joined, the party cannot amend without leave of the court.

[32]

Where the *roll* varies from the *original*, the roll might be amended at *common law* at any time; for the *original* is a record of itself, and the entry of it on the roll is only *ex abundanti*, though the usage is to enter it.

So during the term, the Court might amend any mistake in the *roll at common law*, the roll is only the remembrance of the Court during the term. 3 Rep. 157.

But at the common law after the term, the Court could not amend any fault in the roll, for then the record is not in the breast of the Court, but in the roll itself.

5. WILLIAMS v. HOSKINS.

[Mich. 3 Annæ, B. R.]

THE plaintiff obtained judgment in ejectment for *two houses*, and brought a *scire facias* on that judgment to shew cause why he should not have execution of *one house*; the defendant pleaded *nul tiel record*, and the plaintiff perceiving the fault, moved to amend it. *Sed per Curiam*, this *scire facias* is a good writ, there is no fault in it to amend, and the Court will not alter it to fit it for the plaintiff's purpose in this judgment, when it is probable there may be another judgment in ejectment for one house, and the defendant having taken advantage of it, it shall not be amended to falsify his plea.

1 Salk. 52. By the name of Bucksome v. Hoskins. Mod. Cases 263, 310. See Cro. Eliz. 760. Cro. Car. 162. 1 Roll. 197, 797. 2 Cro. 372. which per Holt, Ch. Just. is a hard strain. Sid. 7. 12.

AMERCIAMENTS AND FINES.

AMONGST the ancients all punishments were *pecuniary*, from whence the *Latines* properly say, *solvere pœnas*; but in process of time this sort of punishment became contemptible, and then for some crimes death ensued.

All *amerciaments and fines* belong to the king, thus *fines upon original writs* and *fines pro licentia concordandi*; and the reason is, because the courts of justice are supported at his charge; and wherever the law puts the king to any charge, for the support and protection of the people, it provides money for that purpose, and this is called *vectigal judiciorum*. Bracton 129.

[33]

An *amerciament* is ordered by the Court, but *affeered by the jury*, and a *fine* is not only ordered, but assessed by the Court; and as for these amerciaments, which are ordered and assessed by the Court, upon officers, who are in con- 8 Rep. 40.

tempt, or in default of their duty, these seem to be rather *fines* than *amerciaments*, though they are commonly so called; and yet it hath been held, that where a *pecuniary penalty* is assessed by the Court upon an officer, it is properly an *amerciament*, but when on a stranger, it is a *fine*.

1 Vent. 209, 270.

Where the defendant is found guilty of a misdemeanor upon indictment, and fined, he cannot move to mitigate the fine unless he appear in person; but he may be *fined* though absent.

Dyer 232. a.

Wherever a fine and *ransom* is mentioned in a statute, the word *ransom* imports a sum treble to the *fine*, though my Lord *Coke* in his *Littleton* tells us it is the same thing.

1 Inst. 127.

Where a statute imposes a *fine* at the will and *pleasure of the king*, that must be intended of his *judges*, for it is by them the fine is imposed.

4 Inst. 71

Where a statute imposes a fine certain upon any conviction, the Court cannot mitigate it; but if the party come in before the conviction and submits himself to the Court, they may assess a less fine, for he is not convicted, and perhaps never might.

1 Roll. Rep. 104. Wray's case.

But though the fine is certain, yet the *Court of Exchequer* may mitigate it, because it is a court of equity, and they have a privy seal for it.

Cro. Eliz. 581.

At a court-leet the steward told *W. R.* he was a *resiant*, who replied, he lied; thereupon the steward fined him 20 *l.*, and adjudged good without a prescription so to do, and debt lies for this fine. But if he fine the jury for a contempt, he must fine them severally, for the contempt of one is not the contempt of the other. 1 *Roll. Rep.* 32.

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[34]

ANCIENT DEMESNE.

1. HUNT *v.* BROWNE.

[Hill. 1 Annæ.]

1 Salk. 57, 244, 339. 1 Lutw. Where a recovery, suffered in a court of ancient demesne

THIS case is put at large in 1 *Lutw.*; and in arguing it *Holt*, Ch. Just. held, That a *recovery in ancient demesne* with double voucher is a bar to an estate tail, as it is in the court of Common Pleas; for a good foundation of

such a custom must be supposed, and it is that which hath given this conveyance such effect and operation: so likewise a recovery by default in that court is a *discontinuance*, as it is in the Common Pleas, and a fine likewise is a *discontinuance*, but *no bar;* and as to that point it is not material, whether the court is a court of record or not; for if the action sued there will recover a freehold, the discontinuance is a necessary effect of such a *recovery*, for every recovery recovereth a fee-simple, and every recovery of a fee-simple, works a *discontinuance;* and therefore a fine levied in this court (if it is a fine) must be of the same consequence and effect as other fines are; and certainly a *fine* may be levied of *lands in ancient demesne*, in the court of the lord of the manor, upon a writ of *right close*, for it is agreeable to the power of that court in other instances; as for example, that the Court may try the *mise* joined upon a writ of right, which hath the same effect upon a non-claim as a fine hath; and the tenants of such lands would be under this great disadvantage, that no fine at all would be levied of their lands, if it might not be levied in that court, but their privileges can never be intended to be to their disadvantage. —To all which the Court agreed.

with double voucher, is a good bar to an estate tail. Comyns 93, 124.

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2. KITE *v.* LAURY.

[Hill. 7 Will. 3. B. R.]

IN ejectment the defendant pleaded, that the *manor of Bray is ancient demesne*, and that the lands in question are held of the said manor, and pleadable by *writ of right close* in the court of the lord of the manor. The plaintiff replied that the lands were in the parish of * *Bray*, and were *frank-fee* and pleadable at common law, and traversed, that they were *pleadable in the court of the manor;* and upon a demurrer to this replication it was argued, that the precedents were otherwise, for it is the *tenure*, and not being pleadable in the *court of the manor*, which is traversable; for that is but a consequence of the *tenure*, to which the Court inclined, saying, that where *ancient demesne* is pleaded, in such case the party (to make a full defence) must either take issue upon it, or traverse the tenure of the manor, or that there was a fine levied, or common recovery suffered, and so rely upon the estoppel, and pray judgment, whether he shall answer to it as ancient demesne, contrary to such fine or recovery. And *nota*, That where ancient demesne is pleaded, the defendant must allege, that the lands are held of such manor which is ancient demesne, and not that they are parcel of such a manor which is ancient demesne.

1 Salk. 56. By the name of Barker v. Wich. It is the tenure that is traversable, and not the being pleadable in the lord's court. 2 Burrow 1047, 1048. Show. 271.

[* 35]

3. ZOUCH v. THOMPSON.

[Mich. 9 Will. 3. C. B. 1 Ld. Raym. 177. S. C.

2 Wils. 17. 3 Lev. 417, 419. Where a writ of deceit lies against the cognisee as well as against the cognisor of a fine. Vide Cruise on Fines 2d ed. 301.

A *FINE* being levied of lands in *ancient demesne*, the lord brought a *writ of deceit* against the tertenant, and against the heirs of the cognisee and the heir of the cognisor, seven years after the fine had been levied; and declared generally, that he was lord of the manor at the time of the fine levied, and yet is lord thereof, without shewing any estate specially; and in this case these points were resolved, (1.) That a *writ of deceit* lies against the cognisee himself as well as against the cognisor, because he is a party to that fine which works a wrong and prejudice to the lord of the manor. (2.) That this writ lies against the *heir of the cognisor or cognisee* because the fine worked a real deceit and not a personal tort only, which dies with the person of the *tort-fesor*, as in *non summons*, for it being a wrong by which the lord is disinherited and barred of his fines and other duties aring from the courts of his manor, it shall by no means die with the person of the wrongdoer. (3.) That the lord need not shew any estate in particular, it is sufficient that he was *dominus pro tempore*, and if his estate should determine by alienation, the tenant ought to plead it *puis darrein continuance*. (4.) The five years non-claim is not material, because a fine may establish the right of another, but can never establish its own defects. (5.) This fine is *coram non judice*, and merely void: See *Br. Fines* 47. *Br. Descent* 14. 21 *Ed.* 3. 20. 7 *H.* 4. 28. 1 *Leon.* 290. *Herne's Pleader* 93.

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[36]

4. SAVERY v. SMITH.

2 Lutw. 1146. The plaintiff in her replication pleaded ancient demesne needs not set forth what title.

IN replevin for taking his cattle, *&c.* The defendant made conusance for toll in *Highworth* market, demanded of the plaintiff, which he refused to pay, and thereupon he justified the taking the cattle; the plaintiff replied, that she is *tenant of the manor of* HANNINGDON *in* WILTSHIRE, which is *ancient demesne*, and that tenants of lands in *ancient demesne* are quit of toll in all places, *&c.* and upon a demurrer to this replication it was insisted for the defendant, that the plaintiff had not made a good title to this *privilege*, because she only set forth, that she is *tenant of the manor* which is *ancient demesne*, when she should have declared, that she is *seised in fee* of such lands, *&c.* which she held of *T. F.*, as of his manor of *Hanningdon*, which is *ancient demesne:* But *per Curiam*, it is not

necessary for such tenants to set forth what estates they have, either in fee simple or otherwise; it is sufficient for them to allege, that *homines & tenentes de antiquo dominico* ought to be discharged of toll, *&c.* then it was objected, that the plaintiff had laid this privilege *too general*, for it was to be discharged of toll *generally*, and *in all places, &c.* when by law tenants in *ancient demesne* are not discharged of toll, but only of such things which arise on their own lands, and which are for the support and ease of them and their families; and the reason of this is, because these lands were formerly in the possession of King *Edward the Confessor*, or King *William called the Conqueror;* and therefore in the *Doomesday-book*, which was made in the *20th year of his reign*, they are called, *Terræ Regis Edwardi*, and those in the possession of King *William* are called *Terræ Regis;* and when any of these lands were aliened from the crown, the tenants were obliged by their tenure to manure the *King's demesnes*, and therefore to encourage them in that labour, they had this privilege to be discharged of toll of all things which did arise or grow on their own lands; but when they turn merchants and traders in other things, they are not within the reason of this privilege; *sed per Curiam*, to be quit of toll in places, shall be intended of such things in all places where he is tenant.

1 Leon. 231. Cro. Eliz. 10 Ward versus Knight.

APPEAL. See Restitution. [37]

BY the common law a female might have an appeal as heir to any ancestor as well as the male; but now, by **Magna Charta*, it is enacted, That *nullus capiatur vel imprisonetur propter appellam fœminæ de morte alterius quam viri sui.*

Cap. 34.

And where a woman brings an appeal of the death of her husband, *ne unques accouple* in loyal matrimony is a good plea; so is a second marriage, but an elopement is not.

2 Hawk. c. 23 s. 36.

It lies at any time within the year and day, to be accounted from the death, and not from the stroke given; but an appeal of robbery may be brought after the year. *Mich.* 13 *Car. James Gower's* case.

2 Inst. 318. 4 Rep. 42. 4 Leon. 16. 2 Hawk. c. 23. s. 33.

1 Inst. 139. In an *appeal of felony*, a nonsuit after appearance is peremptory, and so it is in an *appeal of maihem*, because the writ is *felonice maihemavit*.

2 Inst. 316. In an *appeal of murder*, the defendant cannot justify *se defendendo*, but must plead not guilty, and the jury shall find the special matter; but in cases not capital, as *maihem*, *&c.* he may justify *se defendendo*, but not in defence of his goods; for if he plead not guilty, he cannot give *se defendendo* in evidence.

Cro. Eliz. 196. Hane's case. In an appeal, the defendant having pleaded to issue, may nevertheless waive it, and demur upon the count; for the trial would be in vain if that fail; and yet if the demurrer be adjudged against the defendant, the judgment is only to answer over.

7 Rep. 13. Sid. 196. The father *attainted of felony*, was slain by one who had no authority, the wife shall bring the appeal and not the heir, for *hæres est nomen juris*, but *uxor est nomen naturæ*, and the attainder of the husband cannot extinguish that natural relation which is between man and wife, though it may that civil relation which is between ancestor and heir.

Cro. Eliz. 605. Holland's case. In an appeal against four *by writ*, the defendants appeared at the return, and the plaintiff offered to declare against them as in custody: *Sed per Curiam*, they are not in custody upon their appearance, but there must be a *committitur* or *bail filed*, upon which the plaintiff was called, and nonsuit.

Noy 88. Latch. 175. An infant brought an appeal *per guardianum*, and at the day it was prayed, that the guardian might not be demanded for three or four days being sick; but *per Curiam*, it was denied, and so the infant lost his appeal.



[38]

2. PRINCE *v.* BAWD.

[Mich. 5 Will. 3.]

Vide 1 Salk. 62. 2 Hawk. c. 36. s. 10.

*Dyer 284.

APPEAL of murder, the defendant pleaded *auterfoits* convict for the same offence, and the *oyer* of the record and conviction being demanded, it was moved that it might be entered **in hæc verba: Et per Curiam*, *oyer* of the record was granted, but it shall not be entered *in hæc verba*, because it is a record of the same court; now, upon the *oyer*, several variances appeared, so that it was objected, that the defendant had failed of his record, upon which it was prayed to amend, being all in paper; but on the other side it was objected, that *auterfoits* convict was only pleaded for delay, for it is no bar within the statute 3 *H.* 7. But it was ruled, that before the statute *auterfoits* convict or acquit were good pleas in bar of

an *appeal*, and that the statute has only the two pleas of *auterfoits acquit or attaint*, but that *auterfoits convict* remains as at common law.

3. HOYLE *v.* PITT.

IN an *appeal of murder*, the defendant pleaded a conviction for manslaughter at the sessions held in the *Old Bailey*, and that he had his clergy; and before any demurrer to this plea, or issue joined, there being a fault apprehended, because the defendant did not set forth by *what authority the Court at the Old Bailey* was held; thereupon the defendant, by his counsel, moved to amend his plea: *Sed per Holt*, Ch. Just. the appellant himself cannot amend, and the reason is the same why the appellee should not; for in this case, by an amendment, a new roll is made, whereas in other cases amendments are made when all is in paper; and no statutes extend to amendments in appeals in criminal causes.

4 Mod. 158. Amendment not allowed in criminal cases.

4. BAUSON *v.* OFFLEY.

IN an appeal brought by the wife for the murder of her husband; she declared, that on such a day and year one *Offley* did assault and wound her husband in the county of *H.*, of which wound he afterwards, on such a day, died at *R.* in the county of *C.*, and that one *Lippon* was assisting the said *Offley*, &c. The cause being tried, the jury found that *Lippon gave the wound*, and that *Offley was assisting* him; and now, upon a motion in arrest of judgment, it was insisted for the appellee, that the count and the verdict in appeals must be certain, otherwise no judgment could be given against the appellee; but here the verdict found another person gave the wound, and not he against whom the appellant had declared. *Sed per Holt*, Ch. Just. This is an exception which might as well be made to an *indictment*, as *to a count in an appeal*, for the one ought to be as certain as the other; but in this case it is certain enough, for he who gave the stroke, and he who was assisting in it, are both equally guilty: Then it was objected, that the cause was tried in a wrong county; for it was by a jury in *C.*, when it ought to be by a jury of both counties; since the wound was in one county, and the death in another. *Sed per Curiam:* By the statute * 2 & 3 *Ed.* 6. it is enacted, That an indictment found by a jury of that county where the death happens, shall be as effectual in law, as if the wound which was the cause of such death had been given in the same county.

3 Mod. 121. Where the wound was given in one county and the death was in another county.

[39]

* Cap. 24

5. CULLIFORD'S *CASE.*

1 Salk. 382. S.C. 6 Mod. 219. 2 Stra. 855, 858.

THE defendant being indicted for murder, was found guilty of manslaughter at the assizes, and an appeal was immediately brought; the judge gave the appellee time to plead till next assizes, but in the time the appellant brought an *habeas corpus & certiorari*, to remove both the body and record into *B. R.;* and afterwards the parties agreed, and the appellee being bailed, he appeared in court upon his recognizance, and produced a release from the appellant, and thereupon moved to be discharged, there being a counsel from the appellant, and consenting to it. *Sed Holt*, Chief Justice: The Court will be possessed of the record before he shall be discharged; therefore let the *habeas corpus & certiorari* be returned, and the return filed, then the appellee must be arraigned, and afterwards he may plead this release; but if the appellant is not ready at the return of the *certiorari* to arraign his appeal, or doth not appear in person, the appellee may have a *scire facias* to compel him, and if he doth not come in upon the return of such *scire facias*, he shall be demanded and nonsuit: But the appellee is not yet to be discharged, because there is a record against him in court, and therefore he must be arraigned upon the indictment, and then he may plead *auterfoits acquit*, *&c.*

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[40]

APPERTAINING.

Dyer 362. Co. Ent. 384. Cro. Car. 169.

LANDS may be said to be appurtenant to a *house*, either in the king's case, or in the case of a *common person*, when they have been let and possessed together a convenient time.

Yelv. 159.

A *way* cannot be appurtenant or appendant, as a common may, because it is not an interest, but an easement.

1 Inst. 121.

The thing *which and to which* it is appurtenant, must agree in nature and quality; as *turbary* may be appurtenant to a *house*, but not to *lands;* a leet to a *manor*, but not to a *church;* a *seat* in a church to a *house*, but not to *land:* So an *advowson* shall not be appendant to the *services*, but to the demesnes of a manor, for the demesnes are of a perpetual duration, but the services are not.

A *vicarage* may be appendant to a *manor*, because it is derived out of the *rectory* of common right; and yet by a grant it may be annexed to a manor.

W. R. sells a mill *cum pertinentiis*, the jury find a *kiln* was occupied with the mill for many years. *Sed per Curiam*, that *kiln* shall not pass by those words, for it might be a *lime-kiln*, and may have no relation to the mill; but if the jury had found it to be a malt-kiln, it might be otherwise.

Sid. 24, 211. 1 Lev. 31.

2. REX *v.* BISHOP OF CHESTER.

AN advowson is appendant to a manor, the owner mortgages the manor in fee, except the advowson, it is now become in gross, but if the money is paid on the day, it is become appendant again, and if it is paid after the day, the advowson is appendant in reputation; so that it may pass in a grant by the name of an advowson appendant, though *per Holt*, Ch. Just. in truth the appendancy is destroyed.

Antea, title Advowson. S. C.

3. REYNALDS *v.* BLAKE.

[Pasch. 9 Will. 3.]

TWO *coparceners of a manor;* the *demesnes* are allotted to one, and the *services* to the other, the manor is gone and the advowson becomes in gross; but if one die without issue, and the manor descend to her who had the services, *per Holt*, Chief Justice, the manor is revived again, and the advowson becomes appendant as it was before, for the severance was by act in law.

Antea, title Advowson. S. C.

[41]

APPRENTICES. *See* Indictment 17, 21. Travers 8.

1. PUNTING'S *CASE.*

AN order to discharge an apprentice was quashed, because it was to the *trade of a tallow-chandler*, which is a trade not mentioned in the statute (*a*); besides it was under the hands and seals of *three justices*, when that statute requires there should be *four*.

Order to discharge an apprentice quashed.

(*a*) *Vide ac.* 2 *Salk.* 471. *R. contra Str.* 663. *Adm. contra* 1 *Bott.* 3d ed. 515.

2. PECK'S *CASE*.

[Mich. 10 Will. 3.]

1 Salk. 66. S. C. Where the master dies, his executors having assets, shall provide for the apprentice. 2 Stra. 1266. Sho. 405.

THE master took an apprentice in husbandry, and before the time of apprenticeship expired the master died, and left the apprentice impotent and a cripple; the justices made an order, that the executors of the master should receive and provide for this apprentice: but this order was quashed, because it did not appear that they had *assets* or that they lived in the same county; and, by *Justice Giles Eyre*, this is a personal trust, and determines upon the death of either the master or apprentice, and the executors may be of no trade, or of another trade than the master was; but he held, that an action of covenant would lie against the executors, but then the plaintiff must prove *assets* (*a*). And *per Holt*, Ch. Just. by the custom of *London* in cuch cases, the executors shall put out the apprentice to another master of the same trade; and in other places, where a master hath a great sum with an apprentice, and covenants for his instructions and maintenance, it would be hard to construe his death to be a [42] discharge of those covenants; and that it hath been adjudged, though the covenants for instruction may fail, yet he still continues an apprentice with the executors or administrator, to be *maintained* by them.

(*a*) It is more correctly stated in the report 1 *Salk.* that the executor may make his defence by pleading no assets.

3. ANONYMOUS.

Mod. Cases, 70. The master brought covenant against the apprentice for departing at such a time. Plowden 24.

THE master brought an action of *covenant* against his apprentice for *departing* out of his service *at such a time*. The defendant justified by virtue of a *license* from his master to depart *at that time;* and issue being taken upon the *license*, *Holt*, Ch. Just. held, that upon such a declaration the master shall not give evidence of the defendant's departing without leave *at any other time*, because in this case the time is material and not transitory, as in trespass and other cases.

4. WHITE *v.* ENGLAND.

4 Mod. 145. S. C. Debt upon the statute for the using the

DEBT upon the statute of 5 *Eliz.* for using the trade of a *tiler*, not being apprentice to that trade for seven years. The defendant pleaded, that his father was a

freeman of London, and that he (this defendant) was his eldest son; and that by virtue of a custom in *London*, the eldest son of a freeman *in re patrimonii* might use his father's trade. The plaintiff demurred to this plea, and the counsel for the defendant did not insist upon it, but objected, that the declaration was ill, because the plaintiff did not aver, that the trade of a *tiler* was an art or mystery *used in England*, at that time when the statute was made. *Sed per Holt*, Chief Justice; the very trade is mentioned in this statute, and therefore it must necessarily be intended, that it *was used at that time*.

trade of a tiler, not setting forth that it was a trade used in England at the time when the statute was made.

5. THE QUEEN *v.* COLLINGWOOD.

THE defendant was indicted, for *enticing* an apprentice to take away his master's goods, which he (the defendant) did receive, *&c.* Upon not guilty pleaded, the defendant was found guilty; but upon a motion in arrest of judgment, it was held *per Holt*, Ch. Just. that the indictment was ill, because it did not set forth that the apprentice did *actually take away any goods;* for an *enticement* is not criminal, without something done in pursuance of it: It is true, this indictment sets forth, that the defendant did receive the goods, which implies that they were taken away, for otherwise they could not be received; but a charge in an indictment must be positive, certain, and direct, and not by implication.

Mod. Cases 288. Enticing an apprentice to take away his master's goods not criminal unless some goods were actually taken away.

[43]

2 Hawk. ch. 25. s. 60.

APPROPRIATION.

AN *appropriation* of an *advowson, church, glebe, tithe, &c.* must be to some *body politic* or *corporation;* and when it was made by the patron or first founder, the form was thus: *Ego W. R. de H. concessi ecclesiam & advocationem meam de H., cum terris & decimis omnibus ad eam pertinentibus abbati de S. &c.* so that not only the advowson and profits of the church, but the incumbency itself, which is a spiritual thing, vested in the appropriator.

Plowd. 496.

At *common law* an appropriation could not be made but to a body politic, or to a corporation, for a natural person is not capable of it, because he cannot be perpetual, and an appropriation makes an incumbent perpetual.

Vide Stat. 27 Hen. 8. ch. 28. 32 H. 8. c. 7.

And at *common law* it could not be made to a *lay person*, for as he could not be an incumbent by a presentation, so he shall not by any appropriation, which is but a more lasting incumbency.

These appropriations at first were made to *abbots*, *deans*, and *sole corporations*, who might administer sacramentals, and had cure of souls; but afterwards by dispensations they were made to spiritual corporations aggregate, who had no cure of souls, as to *deans and chapters*, and at last to nuns under pretence of hospitality. *Grande nefas*, as *Dyer* calls it.

Plow. Com. 497.

Hob. 307.

An appropriation cannot be granted over, for it is an incumbency, which is a spiritual thing, it is included in the spiritual function, which, being of the highest trust, cannot be transferred.

Appropriation cannot be made without the patron.

It cannot be made without the *patron*, for his advowson being a lay inheritance, cannot be divested without his consent; neither can it be made without the consent or concurrence of the king, because the advowson itself is held of him mediately or immediately, and he shall not lose his possibility of escheat or lapse, without his consent; but an appropriation may be made by the patron, and the king acting as supreme ordinary, without the bishop: and the reason is, because, before the reformation it might have been made by the king, by the patron and the pope, and whatever the pope might have done is now vested in the king by the statute of *H.* 8.

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[44]

ARBITRAMENT. See The Doctrine of Awards, Cases Temp. Lord Hardwicke 181. Burro. 277, 278, 701.

Umpirage. Godb. 241. 1 Lev. 174. 1 Salk. 71. Kyd, 50.

WHERE an umpire is to be chosen by the arbitrators, the same time may be limited to the umpire as was limited to them to make their award; for by choosing an umpire they determine their own power.

Vent. 116. Sid. 428. 2 Saund. 127. Mod. 275. Jones 167. 1 Roll. 262. contra.

Where a submission was to the award of *A.* and *B.*, *ita quod* they make it by such a time; and if not then, to the sentence of such umpire as they shall choose, *ita quod* he make his umpirage in the same time; an umpirage so made is good, because here was no *concurrent authority*, for by choosing an umpire the arbitrators had determined their own power; and therefore, though the arbitrators

should make an award after they had chosen an umpire, the umpirage shall be good, but the award void.

The law is the same, if the *umpire* was appointed by the parties themselves; for it is not an absolute and concurrent jurisdiction, it is only a power given to the umpire to act, and that his umpirage shall stand, if the arbitrators do not act and make an award.

Pursuant to the submission. Palm. 109, 112, 121. 2 Bulst. 110. 2 Cro. 277, 399. 1 Roll. Rep. 223. Yel. 203. 1 Vent. 50.

Where the submission is *ita quod* the award is made under hand and seal, and the award is only writen, but not subscribed, it is void (*a*); but if the arbitrator makes his mark, it is sufficient.

The submission was to an award of *W. R.* and *three more*, *ita quod* it be made by all four, three, or two of them, in such case an award made by two or three of them is good, because the joint authority, which was first given to all four, was distributed by the *ita quod*, *&c.* and an authority may be divided, though an interest cannot.

Palm. 108.

A. and *B.* submitted all controversies concerning their title in *H.*, a sum of money was awarded to one, and that he should release all actions; the defendant to avoid this award, avers there were other actions: *sed non allocatur*, for it shall be intended only of such actions as they had power over by their submission; and if he should be sued for not releasing any action which doth not concern this title, he may plead the award as to that was void.

(*a*) If the submission is *ita quod* the award be by deed indented, its not being indented is immaterial. *Barnes* 56.



2. FREEMAN *v.* BERNARD.

[45]

[Hill. 8 Will. 3. B. R. 1 Ld. Raym. 247. S. C.]

1 Salk. 69. S. C. Plea of an award to sign mutual releases, not good. Vide Kyd 243.

CASE on an agreement, the defendant pleaded a submission, *&c.* and an award made to sign mutual releases adjudged an ill plea; for it is not intended, that the breach of the old agreement should be discharged by this award, but by the release; it is otherwise where the award itself discharges the old duty and gives a new one.

ARREST.

1. BROWN *v.* BURLACE.

[9 Will. 3. B. R.]

The Temple is extraparochial, but an arrest there was not set aside. Postea, Privilege 12. S. C.

IN this case it was held, that the *Temple* is extraparochial, and not within any parish, that it is not within the city of *London*, so as to come within the customs, but it is within the county of the city, but that the *White Fryars* was within the jurisdiction of the city.

Skin. 685.

That both *Dugdale* and *Stow* tell us, that the *Temple* is privileged from arrests by the grant of the king: *Sed per Holt*, Ch. Just. If the king hath made such a grant, it is void, because the *Templers* have no court of justice within themselves, yet the Court inclined not to countenance arrests in the *Temple in term-time;* but would not set aside the arrest of the defendant, who was arrested in the *Temple*, and so he was held to special bail.

2. ANONYMOUS.

[Pasch. 7 Will. 3. B. R.]

Moor 767. 6 Rep. 54. 9 Rep. 69. A common bailiff is not bound to shew his warrant, but a special bailiff is.

ADJUDGED, that a common bailiff is not bound to shew his warrant, either at the time of the arrest, or at any time after; but he is bound to shew the cause of the arrest, and at whose suit; but a special bailiff may be required to shew his *warrant, for he is not known as a common bailiff is, and no man is bound to submit himself to one who is not known or presumed to have an authority.

[* 46]

3 Cro. 180. 408. Moor 711. Sid. 229.

2 Wils. 372.

If a writ is returnable, 9 *Feb.* or *Octab. pur.* the defendant cannot be arrested by virtue of such writ, either on the 10th or 11th of *February*, though it is before the *quarto die post;* if he is arrested, the officer cannot justify it, either in trespass or false imprisonment brought against him; but if the defendant be taken on a *ca. sa.* on the ninth day of *February*, which is the very day the writ was returnable, the arrest is good.

Pas. 8 Will. 3.

Where a *capias* is awarded against *W. R.*, and a common bailiff knows the writ to be in the hands of the sheriff; *per Holt*, Ch. Just. he may arrest *W. R.* without actually having the warrant.

An arrest in the night is good.

One arrested in *Westminster*-hall, *sedente Curia*, may be discharged upon motion, if the arrest was on *mesne process*, but not if he was taken in execution, but even in that case the officer is punishable, *per Curiam*.

9 Rep. 66. Bulst. 85. Vide Barnes 200. Cromp. Jac. 162. b. Comyns, Privilege, A.

In cases of peers and corporations the process is a *distringas*, for they cannot be arrested.

ASSAULT AND BATTERY.

ADJUDGED, that the defendant may justify an assault in defence of his person, or of his wife, because they are but as one person; so he may in defence of his master, because protection and allegiance is due to him.

1 Salk. 407.

So he may justify in defence of his *father* or *mother*, *children* within age; and even a † wounding may be justified in defence of his person, but not of his possessions.

† 1 Roll. Rep. 19.

* In assault, &c. the defendant may justify the assault to save his person, but not to defend his house or possession; for in such case he must plead *molliter manus imposuit;* but the law seems to be, that he may justify an assault in defence of his *house*, though in such case he cannot justify any *wounding*.

Hill. 8 Will. 3. B. R. 1 Hawk. c. 60. 1 Salk. 407. 2 Roll. 548. Latch. 20.

[*47]

In trespass for a battery and wounding, *son assault demesne* is a good plea, for in this action the trespass is the principal; but in *maihem* it is not a good plea, unless it appear, that the assault was such as endangered his life, for a man cannot justify a *maihem* for every assault; as for instance, a man cannot justify drawing his sword, and cutting off the hand of another, because he struck him; but in such case the defendant ought to plead to the assault specially, (*viz.*) That the plaintiff assaulted him and knocked him down, &c. *et si malum aliquid evenit*, &c. *de injuria sua propria*, &c.

Son assault demesne, a good plea for a battery and wounding, but not in maihem.

2 Salk. 642.

3 Cro. 268. 2 Roll. 547.

A master may justify the beating his apprentice, servant, scholar, &c. if the beating is in nature of correction only, and with a proper instrument, otherwise *immoderate castigavit* is a good reply; and so it was adjudged in *Keits's* case, *per Holt*, Ch. Just.

1 Hawk. c. 60. s. 23.

The defendant justified, that he gave his apprentice gentle correction, but did not say for what.

Assault and battery; the defendant justified, for that the plaintiff was his apprentice, and that he *tempore quo, &c.* gave him gentle correction, and traversed that he was guilty at any time before or after he was his apprentice; and upon a demurrer to this plea it was adjudged ill, because the defendant ought to shew some cause specially, or the fault for which he beat his apprentice, and then conclude *absque hoc*, that he beat him before or after that time.

ASSIGNMENT ON THE STATUTE 32 H. 8. Cap. 34.

Conditions and covenants which run with the land, are annexed to the reversion, and go to the assignee. Co. Lit. 215. b. 385. a. 1 Salk. 317. 5 Co. 11.

THE lessor made a lease for years, and afterwards assigned his reversion to *W. R.* Adjudged, that all conditions and covenants between the lessor and lessee which concern the thing demised, or rent reserved; as for instance, conditions or covenants for *repairing, &c. paying the rent, &c.* are annexed to the reversion by this statute, and pass with it to the assignee, so that he may take the same advantage of them as the lessor himself might have done before he made any assignment; but not any collateral covenants, as to pay a sum in gross, *&c.* are transferred to the reversion by this statute.

[48]

Adjudged, that a bargainee is an assignee within this statute; and so, if he grant his reversion to the use of *W. R.* and his heirs, the *cestui que use* and the bargainee are in by this statute as *assignees*, for they are in by the limitation of the grantor, *and quoad* him they are assignees.

Co. Lit. 215. b. 4 Leon. 29. 5 Co. 112.

Who is an assignee within this statute. 1 Inst. 215.

If a man makes a lease for life to *A.*, and afterwards grants the reversion to *B.* either for life or years, *B.* is an assignee within this statute; but if he grant the reversion only of two acres, or part of the land, he is not an assignee within this statute to take advantage of conditions, because he hath but part of the reversion, (*i. e.*) a reversion in part of the demise, and the conditions being entire, and against common right, cannot be apportioned.

The assignee of a rent, without the reversion, may maintain an action of debt for the rent, if there was an attornment made, so by that and the assignment a privity of contract passes.

1 Lev. 22. Ray. 11. Post 303.

Though the lessee assigns, yet the lessor may have an action of debt for the rent, and so may his executor; for there is a privity of contract between them.

But the heir of the lessor cannot maintain an action of debt, because the estate is not in him, but in the assignee, and there is no privity of contract between them.

Sid. 127. 3 Lev 154. 3 Co. 22.

Debt for rent was brought against an assignee; the defendant pleaded, that he assigned over his lease; this is ill, unless he shew also, that the lessor had notice of the assignment, and that there was nothing due at the time of the assignment; but covenant will lie against the lessee, after such an assignment and acceptance of rent.

ATTACHMENT FOREIGN. [49]

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1. MASTERS v. LEWIS.

[Trin. 7 Will. 3. B. R. 1 Ld. Raym. 56. S. C. Skin. 516. S. C.]

A CREDITOR of *W. R.* attaches money in the hands of the ordinary. Adjudged, that it could not be, for a foreign attachment cannot charge any other person than the debtor himself, which the ordinary is not, before goods of the intestate come to his hands, for no creditor of the intestate can sue him till he hath actual seisin, and before such seisin he hath so little interest in the matter that he can neither release or bring the action; but goods in the hands of an executor or administrator may be attached by a foreign attachment, because they are debtors; and yet by this means a debt upon simple contract may be paid before a debt upon specialty.

3 Mod. 75, 92. S. C. Foreign attachment charges only the debtor. Vide T. Jon. 165. Doug. 16, 363. Bl 834. 3 Wils. 297. 1 Roll. 554.

2. INGRAM v. BERNARD.

[Hill. 13 Will. 3. B. R. 1 Ld. Raym. 636. S. C.]

Money awarded was attached. Vide 1 Sid. 327.

THE arbitrators made an award, that *W. R.* should pay so much money on the *second day of January*, he having given a bond to perform the award that was attached on the *first day of January*, and the money awarded was taken upon that attachment on the *second day of January*. And *per Holt*, Ch. Just. This would have been a good plea in an action of debt brought upon the award, but not to an action of debt brought upon the bond of submission, because the bond is forfeited; and when a bond is forfeited, it is not the money in the condition, but the money in the bond itself which is attached.

1 Roll. Ab. 52, 105. Cro. El. 63, 86 1 Leon. 30. Comyns, Attachment, 1. D.

A debt due by judgment obtained in the courts of *Westminster*, whether the action was for debt or damages, cannot be attached by the custom of *London*.

1 Roll. Rep. 268. Where a procedendo was granted after an attachment.

A creditor of *W. A.* attaches his debt in the hands of *W. S.*, who was indebted to the said *W. A.*; and this being removed into *B. R.* by *certiorari*, a *procedendo* was granted, because the party cannot have the like remedy in

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B. R. as he may in *London*. *Et per Curiam;* If *A.* should sue *W.* here, and the defendant should plead the foreign attachment, we will allow the custom, because it comes in by way of plea; but where it comes by way of original suit we cannot do right to the parties, therefore a *procedendo* was granted.

ATTORNEY.

1 Inst. 128. 8 Rep. 58.

IN all actions at *common law*, and in all courts, both the plaintiff and defendant appeared in person; for the writ commanding them formerly to appear, it was understood an appearance in person, and therefore the entry is still *quærens obtulit se:* by which policy there were many vexatious suits prevented and avoided; for the parties were compelled to follow their suits in proper person, and could not otherwise prosecute, unless they had the king's special warrant for that purpose.

But though the parties could not appear by attorney, yet after appearance, and when the suit was in any of the

superior courts at *Westminster*, they had power to allow them to proceed by attorney; but in other courts that privilege was not allowed, but the party must sue out a *dedimus potestatem de attornato faciend'*.

F. N. B. 25. c.

One who is attorney of record, may bring an action of debt, or an action on the case, for his fees; but he who is not an attorney of record can only have an action on the case.

Action for his fees.

Assumpsit by an attorney; in which he declared, that the defendant promised to pay his fees; the defendant pleaded the statute 3 *Jac.*, and that the plaintiff had not given him a bill under his hand; and upon demurrer to this plea the plaintiff had judgment, because the statute doth not extend to a special action upon the promise.

Allen 4. 3 Jac. cap. 7. Vide ante 19. contra. See stat 2.Geo.2. for regulating of attornies and solicitors.

2. ANONYMOUS.

[Trin. 2 Annæ.]

IF an attorney appear, and judgment is against his client, and he had no warrant of attorney from him to appear, the question was, If the Court would set aside the judgment? *Et per Curiam:* If the attorney is responsible, it shall not be * set aside, because the judgment was regular; and there is no reason that the plaintiff should suffer when he is not in fault: But if the attorney is not responsible, or suspected to be unable, the judgment shall be set aside, for otherwise the defendant has no remedy.

1 Salk. 88. S. C. Where an attorney appears without a warrant, and judgment is had against his client, it shall not be set aside, if the attorney is responsible.

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ATTORNMENT.

QUARN *v.* ROWE.

[Hill. 5 Will. 3. B. R.]

THIS case is reported in 1 *Salk.*, by the name of *Gwam & al'* versus *Roe*, but not in the following manner, which was thus:

1 Salk. 90. S. C.

ss. Tenant in tail made a lease to *W. R.* to commence five years after, but in the mean time he levied a *fine* to *L. R.*, to the use of the conusee and his heirs; afterwards

Where an attornment is necessary to create a privity. Skin. 367.

the lessee entered by virtue of this, and the conusee brought an action of debt against him for rent arrear reserved on the said lease; and upon a demurrer to the declaration it was objected, that it was ill, because the plaintiff did not set forth any *attornment*, and he being in by the *common law*, and not *by the statute of uses*, an *attornment* is necessary to create a privity and to support this action: But this objection was not allowed, because the lessee, having only an *interesse termini* at the time of the fine levied could not attorn; and the reversion upon his term passed at that time as included in the possession.

W. R. made a lease to *B.* for fifty years, and afterwards granted his reversion to *R.*, then *B.* assigned the term to *R.* before any attornment, and before he had notice of the grant of the reversion: Adjudged, that the whole estate is vested in *R.* immediately, and that the term is extinguished: for in this case there is nobody to attorn, and therefore the law vests all in *R.* without any attornment.

1 Vent. 248. [*52] *The lessor granted the reversion to another, and afterwards brought an action of debt for the rent; the lessee pleaded, that he had granted away the reversion, but did not set forth that he attorned: Adjudged, that this plea of itself amounted to an attornment.

2 Cro. 87. Adjudged, That an attornment to part is good for the whole, for it shall be taken most strongly against him; and he having only a power to assent, he cannot divide or apportion the thing granted.

AVERMENT. See Superstitious Use 3.

1. MATTHEWS *v.* CAREY.

[Mich. 1 Will. 3. B. R.]

1 Salk. 107. S. C. 3 Mod. 137. In trespass the defendant justified under a presentment in a leet, and good.

IN *trespass* for taking a distress, the defendant justified, under a *presentment in the leet*, for an offence, *&c.* and did not aver in his plea, that the offence *was committed;* and upon a demurrer it was adjudged, that he need not make such an *averment*, because as to him it is not material whether the offence was actually committed or not,

it is sufficient that the jury had presented it; and as to this matter, the Court distinguished between a *replevin*, and a *trespass*; for in the first case the bailiff is an *actor*, and must recover upon the merits of the cause, but in trespass he is only to excuse the wrong alleged against him; but the plea was adjudged ill upon another point: which see in 1 *Salk.* 103.

Vide 2 Str. 847. Cro. Eliz. 885.

2. Adjudged, that *negative pleas* ought not to be averred, because a negative cannot be proved; but affirmative pleas must be averred, with *hoc paratus est verificare*.

Negative pleas need not be averred. Co. Lit. 303. Comyns, Pleader, E. 33.

3. *In debt upon a bond for performance of covenants, the defendant pleaded performance; the plaintiff replied, that he was bound to give him (the plaintiff) an account of all money received, &c. and shews, that 10*l.* came to his (the defendant's) hands, and that he had not accounted for it; the defendant, in his rejoinder, confessed the receipt of the money, but pleaded, that he laid it up in his master's house, and that it was stolen, *et hoc paratus est verificare*: Adjudged, that this averment was proper, and that he ought not to have concluded to the country, because, having alleged new matter, he ought to give the plaintiff liberty to come in and answer it.

Where hoc paratus est verificare is good.

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But now the want of *paratus est verificare*, or *prout patet per recordum*, is aided by the statute 16 *Car.* 2.

4. MASON *v.* MARCH.

[Trin. 11 Will. 3.]

IN *false imprisonment*, laid to be in the vacation, the defendant pleaded a writ issued *teste in term-time*, *per quod* he took the plaintiff; he may reply, that though it was *teste in term*, yet he took him in vacation; for *per Holt*, Ch. Just. where the *teste of a writ* is in support of justice, no averment shall be admitted against it, otherwise where it is to justify a wrong done.

Where a teste of a writ is in support of justice, an averment shall not be against it; otherwise where it is to justify wrong.

AVOWRY.

1. NOT only he who brings the *replevin*, but the *avowant* also is an actor; for the one sues for damages in taking the cattle, and the other sues for a *retorn habend'*, or a

Plowd. 392.

restitution of the goods taken; and therefore the avowant (*i. e.*) the defendant must conclude his avowry as declarations are concluded, and not with an *hoc paratus est verificare*, for he is an actor, and his avowry is his declaration, and the return of the goods is his recovery.

Sav. 111.

2. In an avowry for *damage-feasant*, the defendant intitled himself under a lease of the husband, and for not shewing it was by deed, for that it could not be the lease of the wife, but of the husband only; and this being made an objection, it was disallowed, because the plea was by way of bar, and a bar is good to a common intent.

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2 Lev. 92. Show. 401. 1 Salk. 94.

3. In *replevin*, the defendant made conusance, for that the goods taken were the goods of *W. R.*, and not the goods of the plaintiff; and upon a demurrer to this avowry, the avowant had judgment; for though he did not pray a return in his avowry, yet he shall have judgment for a return, because it appears by the declaration, that the defendant took the goods, and so had the possession of them, till by the replevin they were delivered to the plaintiff, and therefore they shall be returned to the defendant, that he may be *in statu quo prius*, *&c.*

4. In *replevin*, the defendant avowed for *damage-feasant*, and had a verdict: Adjudged, that he shall have a *retorn habend'* for the cattle, and a *ca. sa.* for the damages; but if the party tender the costs and damages, the sheriff after such tender ought not to execute the *retorn habend'*.

3 Cro. 162.

But if for want of such tender the sheriff doth execute the *retorn habend'*, and afterwards the costs and damages are paid, a writ *si constare poterit*, *&c.* lies upon suggesting that the costs, *&c.* are paid, and this is to deliver the distress, and this is called a writ of restitution.

5. PARKER *v.* MELLER.

[Pasch. 2 Annæ.]

IN *replevin*, if the defendant had the *possession*, it is a good bar against the plaintiff if he has no title, but he cannot give a return, unless he shew a property in the goods; and it is sufficient if they were delivered to him, for otherwise the judgment must be *quod quærens nil capiat per billam*, *but no* return.

AUTHORITY. See Deputy. A Lease at Will. 3.

BAIL.

1. WYATT *v.* EVANS.

[Hill. 5 Will. 3. B. R.]

DEBT for 99*s.* upon a *plaint* levied in an *inferior court*, and bail put in; afterwards the cause was removed by *habeas corpus* into *B. R.*, and there the plaintiff declared as in debt *upon a bond* for 6*l.* The question was, Whether the bail put in here, upon the *habeas corpus*, should be liable? and adjudged, that they should not, for it was another cause of action than that to which they were bail.

Where bail put in upon the removal of a cause by habeas corpus, is not liable.

Vide Cromp. Prac. 427.

2. ANONYMOUS.

[Pasch. 4 Annæ. B. R.]

DEBT was brought in *C. B.*, and a recognizance taken, and an action of debt was brought on that recognizance in *B. R.* The Court was moved, that there might be no *special bail* given, for that this was only a device to better the security. *Sed per Holt*, Ch. Just. and *Powell*, upon a recognizance of bail in *C. B.* no *capias* lies, because it is for a sum certain; but upon the like recognizance in *B. R.* a *capias* lies because it is *body for body*, and there may be a reason to help them to a *capias* upon the recognizance; and *per Holt*, in debt upon a judgment pending a writ of error, the Court will discharge the defendant upon common bail; but *per Powell*, Just. it was anciently otherwise.

Debt in B. R. on a recognizance of bail in C. B.

Comyns, Bail, K. 3.

3. BUTLER *v.* ROLLS.

THE defendant was sued on a bail-bond; to which action he pleaded, and had notice of trial; and then he moved to stay proceedings on the bond, upon bringing the principal, interest, and costs into court, which was granted, so as he bring it in such time, that the plaintiff might not be delayed of the trial, otherwise to proceed.

Mod. Cases 25. Where proceedings were staid upon the bail bringing in the principal money, and interest, and costs into court.

4. It was ruled *per Holt*, Ch. Just. that the ancient course was, that a bail-bond could not be put to suit till a rule was had to amerce the sheriff, for not having the body at the return of the writ; and the course now is to stay proceedings on the bail-bond, if there is no return of a *cepi corpus*.

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Mod. Cases 229. Proceedings on the bail-bond must stay, if there is not return of a cepi corpus.

5. CRAGGETT v. GLOVER.

Mod. Cases 301. Where a prisoner discharged and retaken must find special bail.

AFTER a prisoner for debt under 100*l.* was discharged by the justices, pursuant to the act of poor prisoners, he was taken again for above 100*l.* at the suit of one man, and it was ruled, that he must find special bail.

6. GIBBONS v. DOVE.

Mod. Cases 230. Bail on a writ of error, the other side hath twenty days time to except against them.

BAIL was put in upon bringing a writ of error; the course is, that the other side shall have twenty days to except against them, which exception must be entered in the book of the clerk of the errors, and then he who excepts, must take out a rule to put in better bail, and serve the attorney on the other side with it; but such rule needs not be served within twenty days.

7. BARNEY'S *CASE.*

5 Mod. 323. A woman bailed that was indicted for petit treason.

A FEME covert was indicted for *petty treason*, in murdering her husband; and the grand jury having found the bill, she was brought to the bar, and moved by her counsel to be bailed; and there being some *affidavits* read of the fact, by which it appeared to the Court that the prosecution was malicious, and there having been no proceedings for some time, either upon the indictment or the coroner's inquest, the Court thought fit to bail her.

2 Cro. 738. 2 Bulst. 182. Moor 850. Ca. sa. against the principal, and non est inventus returned, yet the Court will receive a render in favour of the bail.

8. Adjudged, that though *non est inventus* is returned upon a *ca. sa. against the principal*, yet the Court will receive a *render;* so they will upon the return of the first *sci. fa. against the bail*, and so they will upon the return of *the second sci. fa.* so as it be done on the day of the return, either sitting the Court, or afterwards at a judge's chamber; but though the Court doth receive such *renders* in favour of the bail, yet it is *de mera gratia*, and not *de jure*, and therefore the bail cannot plead such *render* to a *sci. fa.* brought against them.

Where the bail may plead the death of the principal. 5 Mod. 167. Cro. Jac. 163. [* 57]

9. * But in a *scire facias against the bail*, they may plead the death of the principal before the return of the *capias;* for they had time till then to render him, but not afterwards, for by the return of *non est inventus*, the recognizance is forfeited.

10. KING *v.* SHARP.

[Hill. 7 Will. 3. B. R.]

SCIRE facias against the bail, who plead; That the principal died before the return of the *capias*, *&c.* and upon a special demurrer, this plea was adjudged ill; for it should be, that he died before the return of *any capias*, that it may appear he was not alive at the return of the first *capias*, for if he was, the recognizance is forfeited.

5 Mod. 167. Bail pleaded, that the principal died before the return of the capias against the principal, not good. Jones 29.

11. Now the reason why the death of the principal before any *capias* sued out, is a good plea, is, because the principal had election either to pay the money, or to render his body to prison, and the last is become impossible by the act of God.

12. But the *bail in a writ of error* cannot render the principal in discharge of themselves, because they are bound, that he shall prosecute his writ of error with effect, or pay the money, if judgment be affirmed.

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13. GROSVENOR *v.* SCAME.

[Hill. 2 Will. 3. B. R.]

IF the sheriff take *insufficient bail*, no action lies against him; but if he hath not the defendant forthcoming to appear and answer the plaintiff, he may be amerced, but not after the plaintiff hath accepted an assignment of the bail-bond.

Mod. Cases 122. No action lies against the sheriff for taking insufficient bail. 1 Salk. 99. ac. 1 Ld. Raym. 425. contr.

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14. PAGE *v.* PRICE.

WHERE an *executor* is sued in the *detinet*, as he must upon the contracts of his testator, he shall not put in special bail; but he must, if he is sued on his own bond or contract.

Where an executor shall put in special bail, where not.

15. *Nota*, All crimes were bailable at common law, for *carcer est mala mansio*, that place being surety for none but such who could find no other, and they were bailable by the sheriff or bailiffs of franchises, and sometimes by writs; as that *de odio & atia homine replegiando*, or the writ *de manucaptione*, and sometimes *ex officio*, and in all cases by *B. R.* upon a *habeas corpus;* but *homicide* was by statute *excepted* out of the power of the sheriff, so that he could not bail in that case, without the writ *de odio & atia*, and that was founded upon an inquisition, by

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which it was found, that the party was indicted out of malice.

16. But in cases of *murder*, *manslaughter*, *felony*, *&c.* the party is not bailable *per statute Westm.* 1. *cap.* 15. especially where there is any presumption of guilt, (*i. e.*) he is not bailable by the justices of peace, for they are within this statute; but they are bailable in *B. R.* at discretion, for the statute doth not extend to that court.

17. ANONYMOUS.

[Trin. 11 Will. 3. B. R. 1 Salk. 104. pl. 7. S. C.]

Murder not bailable.

A PERSON was committed for *murder*, and he moved to be bailed. Two judges were of opinion that he might, because the evidence did not prove him guilty; but *Holt*, Ch. Just. and *Gould*, Just. were against it, for that the evidence did affect him, and to allow him this favour would discourage prosecutions; and they would not give any opinion of the evidence, for as it might prejudice the prisoner on the one side, so it might the prosecutor on the other side.

18. ANONYMOUS.

[Pasch. 7 Will. 3.]

One in execution for usury, not bailable. 1 Ventr. 2. 1 Sid. 286, 382.

PER Holt, Ch. Just. one in execution upon a judgment for usury, brought a writ of error in *B. R.*, and moved to be bailed, but, it was denied, though there was an apparent error in the record, and though it was formerly the practice to bail in such case; for *per Curiam*, we ought not to enlarge a prisoner in execution: but it is otherwise upon an *audita querela*.

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BANKRUPT.

1. FELTHAM *v.* CUDWORTH.

[Pasch. 12 Will. 3. B. R. Rot. 97.]

Far. 10. Composition made by virtue of the statute against

SCIRE facias on a judgment, the defendant pleaded a composition for 2*s.* in the pound: *Ita quod* it be paid within five years after the major part of his creditors in

number and value shall subscribe the said composition; and after the defendant should be *discharged from imprisonment;* and upon a demurrer to this plea, *Holt*, Ch. Just. was of opinion, that a composition by virtue of the statute must be final, and such as will bind the defendant, and from which he cannot vary, that those words *ita quod*, in things executory (as in this case) make a condition precedent; but in estates executed, they make a condition subsequent, and so is *Littleton* to be understood, that the payment of 2*s*. *per* pound being a condition precedent to this agreement, and wholly in the power and will of the defendant till it is paid; it is therefore no complete agreement, and consequently not within the statute; and this case is the stronger against the defendant, because it doth not appear by his plea, that *he was in prison*, so that this condition precedent may be impossible to be performed, and consequently the agreement can never arise; it is true, it might have been otherwise if the 2*s*. in the pound had been agreed to be paid within the five years, in the nature of a defeasance to the agreement, for the statute operates as a defeasance.

bankrupts must be final.

2. HUSSEY *v.* FIDELL.

[Hill. 12 Will. 3. B. R.]

ADJUDGED, That a sale of goods by a bankrupt, after an act of bankruptcy, is not merely void; the contract is good between the parties, but it may be avoided or not avoided by the commissioners and assignees at pleasure; therefore they may either bring trover for the goods, as supposing the contract to be void, or may bring debt or *assumpsit* for the value, which affirms the contract.

Sale of goods by a bankrupt after an act of bankruptcy, void. Vide Skin. 149.

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3. ELLIS *v.* OLLAVE.

[Trin. 11 Will. 3. B. R.]

IN a case between the said parties, an objection was made to the composition, for that the agreement appeared to be only to, for, and *with these creditors who were parties, and had signed the composition;* but this objection was disallowed, because the statute makes this an agreement for the rest.

Composition made with the parties signing, binds the rest.

4. DYSON *v.* GLOVER.

[Trin. 11 Will. 3.]

The act recited as nonsense.

THE defendant setting forth and reciting the statute in his plea, alleged it thus, (*viz.*) *quod liceret vad' & pro duobus, &c. realium creditorum facere agreamentum, &c. cum aliquibus creditorum suorum; & per Curiam*, this being a private act and set forth as *nonsense*, and the defendant having not brought himself within it, it is ill; for he hath compounded as a debtor, and not as a creditor: So the plaintiff had judgment.

Cro. Car. 568. Jones 451. Copyhold estate bound by the sale of the commissioners.

5. The custom of a *manor* was, that where a *copyholder* died seised in fee, his wife should have the third part of his lands for her *dower* for life, and thirteen years after, which custom was confirmed by act of parliament, afterwards the *husband copyholder became a bankrupt*, and the commissioners sold his estate to his creditors; then the husband died, and after his death the vendees were admitted, and the wife claimed dower, alleging, that her husband died seised; and the rather because the vendees were not admitted till after his death: *Sed per Curiam:* The estate of the husband was bound by the sale of the commissioners, and the bargainee was vested of the estate, though he could not enter to take the profits, till admittance and composition with the lord for a fine; but if it should be otherwise, yet when once the bargainee was admitted by the lord, such admittance shall have relation, and divest the whole estate *ab initio* (*a*).

2 Cro. 25. Sale of goods by a bankrupt, but before any commission taken out, void.

6. A man became a bankrnpt 12 *Feb.*, and afterwards, but before any commission taken out, he made over his goods to *W. R.*, who was one of his creditors, in satisfaction of his debt; afterwards the commissioners sold these goods to other creditors who brought an action of *trover* against *W. R.*; *& per Curiam*, the sale made to him by the bankrupt is void by the statute, for it would be absurd that he should be credited to dispose and distribute his goods, who is discredited by his bankruptcy.

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(*a*) *Vide ac.* 1 *Salk.* 185. and notes thereto.

7. ANONYMOUS.

[Pasch. 7 Will. 3.]

The interest of a joint trader is not bound by the bankruptcy of his companion. 1 Atk. 136.

TWO joint traders; one of them became a bankrupt: *Per Holt*, Ch. Just. The commissioners cannot meddle with the interest of the other, for it is not affected by the bankruptcy of his companion.

BARGAIN AND SALE.

1. *EMPTIO & venditio* is an agreement for the seller to part with a thing *for money* given to him by the buyer, for if it be of one thing for another *in specie*, it is not a bargain and sale, but an exchange, which was the original way of buying before money was invented.

Vide 2 Bl. Com. 446.

2. *In emptione & venditione*, we are to consider not only what is the express agreement of the parties, but likewise what is implied *jure naturali & positivo*.

3. And first it is implied, that the seller shall deliver the thing sold, and that he shall keep it safe till it is delivered, which he is bound to do with the same care as if it was a thing lent to him; for the seller had, or is presumed to have, a benefit by the sale; but this care of keeping is only for a reasonable time, for after a faulty neglect of the buyer, if the thing is lost, the seller is not liable, unless it was lost *dolo malo*.

4. Where no place, or time of delivery, or payment is appointed, it is always implied, that the delivery be made immediately, and payment upon the delivery, unless it is inconsistent with the nature of the thing to be delivered.

5. Now by a bare agreement the bargain may be so far perfected, without any delivery or payment of money, that the parties may have an action on the case for non-performance of the agreement, but no property vests till there is a delivery; and therefore if a second buyer gets a delivery, he has the better title.

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6. As to bargain and sale upon the statute, it has been held, that if a man plead a bargain and sale of a rent, and set forth no consideration, in such case he must shew an *attornment*, for then it enures as a *grant at common law*, which cannot be without an *attornment;* but if a consideration is expressed, it is otherwise, because then it is a conveyance by the statute, to which an attornment is not necessary, but then he must plead it to be inrolled, and in what court, that the defendant may be able to find it.

Bargain and sale, without any consideration, not good without an attornment. Carth. 221.

7. And as to that matter, to plead a bargain and sale of a reversion by deed *debito modo irrotulat' in Cancellaria*, is not good after a verdict; for *non constat*, whether it be an inrolment at common law, or by the statute.

3 Cro. 166. Yelv. 213. Carth. 221.

2d Saund. 11.

3. But if it is said *per indenturam secundum formam statuti debito modo irrotulat' in Cancellaria*, it is good, for *debito modo* implies all, *viz.* a consideration, and within *six months*.

BARON AND FEME.

See Executor 2.

1. MADDOX *v.* WINNE.

[Pasch. 12 Will. 3. B. R.]

Where they are but as one person in law.

HUSBAND and wife were sued, and afterwards in the pleadings it was said *venerunt partes prædict' per attornatos suos prædict'*, this was held naught upon a writ of error, because they are but one person in law.

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2. WOODIER *v.* GRESHAM.

[Mich. 9 Will. 3.]

1 Salk. 116. S. C. Scire facias by husband and wife on a judgment she had dum sola, and an award of execution, and then the wife died, the right is attached in the husband.

SCIRE facias was brought by husband and wife, upon a judgment obtained by the wife *dum sola*, upon which *scire facias there was an award of execution*, and then the wife *died*, and the husband brought a *new sci. fa. &c.* and afterwards, upon a writ of error brought, the question was, Whether what was recovered by this judgment should go to the husband, or to the administrator of the wife? It was insisted for the administrator, that the award of execution upon the first *scire facias*, did not vest any right in the husband, because the execution must still be on the judgment obtained by the wife. But *per Holt*, Chief Justice. This case does not differ from the case of **Obrian and Ram*, which was judgment against a *feme sole*, who afterwards married, and upon a *scire facias* brought against husband and wife, execution was awarded against both; then the wife died, and a *sci. fa.* was brought against the husband alone, and he was adjudged to be chargeable; which proves, that the award of execution upon the first *scire facias*, made a plain alteration of the case, for if that had not been done, the husband would not have been

*Mich. 3 Jac. 2. B. R. Rot. 182. 3 Mod. 186. 1 Mod. 170.

liable upon the judgment had against his wife; so here, in the principal case, by the award of execution upon the first *scire facias*, a right is attached in the husband, which shall survive to him after the death of his wife, and that he might charge another in the same manner as he might be charged himself.

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3. BUCKLEY & *UX'* v. COLLIER.

[Mich. 4 Will. 3. B. R. 1 Salk. 114. S. C.]

HUSBAND and wife brought an action on the case, in which they declared, that the defendant being indebted to them for periwig-work done by the wife, at the instance and request of the defendant; he promised to pay, &c., and upon a demurrer to this declaration, it was adjudged ill, because the duty belongs to the husband, and shall survive to his executors if he die; therefore she ought not to be joined in this action with the husband, unless an * express promise had been made to her to pay the money.

Where the wife ought not to be joined in the action, unless an express promise was made to her. 4 Mod. 156.

* 2 Cro. 77, 205. 1 Sid. 25. 2 Roll. 250.

2 Wilson 414. See a great case on this subject.

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4. MACHELL & *UX'* v. GARRETT.

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[Mich. 11 Will. 3. B. R.]

CASE, &c. by husband and wife, for a cause arising to the wife before marriage, &c. The defendant pleaded, that the plaintiffs *nunquam fuerunt legitimo matrimonio copulati*. The plaintiffs replied, that *they were married* at such a time and place; and upon a demurrer to this replication, the plaintiffs had judgment; for *per Curiam*, in personal actions (as this was) it was right to lay the matter upon the *fact of the marriage*, to make it issuable and triable by a jury, and not upon the *right of the marriage*, as the defendant had done in his plea, and as it ought to be done in *appeals* and *real actions*.

where nunquam in legitimo modo copulati, is no good plea. 12 Mod. 276. S. C. Vide ac 1 Salk. 437.

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5. HUTTON v. MANSELL.

[Pasch. 3 Annæ.]

CASE by feme sole, in which she declared, *quod cum* she agreed and promised to marry the defendant, he in *consideratione inde* promised to marry her, and at the trial the promise of the man was proved. *Et per Holt*, Ch. Just.

3 Lev. 65. S. C. ante 16.

there is no necessity of proving an actual promise on the woman's part; for it is sufficient evidence to shew, that she countenanced the promise, and carried herself so as one who approved and consented to it.

Hob. 3. Roll. 344. Where husband and wife mortgage her lands, and she die, the husband shall redeem.

6. Adjudged, That where baron and feme mortgage *the lands* of the wife, and she dies, the equity of redemption shall survive to the husband, and not to the administrator of the wife; but if he die, the wife shall have the benefit of redemption, and not the executor of the husband (*a*).

(*a*) There is an inaccuracy in saying—*the lands*. The case referred to in the margin relates to the mortgage of a *term of years*, and redemption by the husband. The inference arising from it is, that, subject to the mortgage, the estate continues in its former plight. For which point also, *vide* 2 *Vern*. 438.

7. POWELL *v.* MAINE.

3 Lev. 403. Where he alone may bring the action.

T. M. entered into a bond to a feme sole, conditioned to pay so much money on a day certain, and afterwards she married the plaintiff, who brought an action of debt on this bond. The defendant demanded *oyer* of the bond and condition, which was to pay so much money to the wife, and then he demurred to the declaration. *Sed per Curiam*, judgment was given for the plaintiff (*b*).

(*b*) *Vide contra* 1 *Roll*. 347. 4 *Viner* 75. *Litt*. 375. *Vide* 10 *Mod*. 163. *Owen* 82.

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8. WITHERS *v.* KELSEY.

1 Ch. Rep. 189. 1 Wilson 168, 169. Lands were charged to pay a woman's portion, she married and the husband died before he received it, the executor of the husband shall have it. Vide 4 Viner 40. 2 Vern. 501. Gilb. Eq. 100. Ch. Ca. 27. 1 Vern. 161.

A WOMAN had a portion devised to her, and the payment thereof was charged *on certain lands*, afterwards upon her marriage with *T. S.* he settled a jointure on her, and died, before he received the portion, having made a will and appointed an executor. Adjudged, That the executor shall have this money, because it is not in nature of a chose in action, but in nature of a rent, for it is *charged on lands*, and it is given the husband by the intermarriage; and for that reason it shall go to his executor, and not to his wife surviving him.

9. THOMPSON *v.* WOODS.

3 Lev. 218. S. C. Plea to a debt on a bond to leave his wife so much, not good.

DEBT upon bond conditioned to leave his wife 80*l*. at his death, in case she should survive, so that she might receive and take it to her own use; the hus-

band died; and, in an action of debt brought against his administrator, he pleaded, that the husband made a will, and his wife executrix, and left goods to the value of 100*l.* and upwards, and devised, that she pay herself the said 80*l.*; and upon a demurrer to this plea, it was adjudged ill; because the husband at his death might owe money on judgments and statutes, and so she might not be able to pay herself, and his estate might be so encumbered, that it would be better for her to renounce the executorship.

10. RANDS *v.* TRIPP.

Promise to pay the husband so much when his wife should be a lady, good.

THE plaintiff being a tradesman in *London*, and having married the defendant's daughter, with whom he had 400*l.* portion; the defendant spoke merrily in company, that as soon as his son in law should be knighted, so that his daughter might be a lady, he would give her 2000*l.* Afterwards the plaintiff, without acquainting the defendant with it, procured himself to be knighted, and then brought an action upon this promise, and the jury gave 1500*l.* damages, which the *Chief Justice* thought a very hard verdict, because the words were spoken merrily, intending only to pay the money, when the plaintiff by his trade (which was a tobacconist) should get an estate to qualify him for knighthood, and therefore a new trial was granted (*a*).

(*a*) There being no date to this case, it might have arisen before the statute of frauds; but, since that statute, the action clearly could not be maintained, even setting aside the other ground for a new trial.

BASTARD. [66]

1. MASTERS *v.* CHILD.

[Hill. 10 Will. 3. B. R.]

Bastard is settled in the place where born, unless by fraud she was delivered there.

RULED, That the birth of a bastard child *prima facie* settles it in the place where it was born; but if a woman big with child of a bastard, and *settled in one*

parish, is persuaded to go into another, and there to be delivered, this fraud will make the parish chargeable where the mother was settled, though the child was not born there: But if a woman with child of a bastard come *accidentally into one parish*, and is persuaded by some of the parishioners to go into another parish, which she doth, and there is delivered, this shall not charge that parish which persuaded her.

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2. THE QUEEN *v.* CHAPIN.

[Pasch. 1 Annæ, B. R. 2 Ld. Raym. 858. S. C.]

Order, that the reputed father should give security to perform the order, quashed.

AN order of sessions was made upon an appeal, for maintaining a bastard-child, which order was quashed; and thereupon it was moved, that the reputed father might be bound in *B. R.* to appear below; and *per Curiam*, if the original order made by the justices is below, we will oblige him to go down again; but if it is here, we cannot; and it appearing, that the original order was in *B. R.*, and by consequence, that the justices could have no authority below, the Court was moved, that the reputed father might give security to perform: but that was opposed, because the course is to pray that the order might be confirmed, and then there is occasion for giving security; because, if the order thus confirmed is not obeyed, the other side may have the process of this court against the reputed father, or he may be bound to appear at the sessions: afterwards this order was quashed as to part, and confirmed as to the residue; the part for which it was quashed was, that the reputed father *should give security to perform the order*, which, *per Curiam*, is naught.

5 Mod. 168. Comb 356.

3. A bastard is *terminus a quo*, he is the first of his family, for he hath no relation of which the law takes any notice; but this must be understood as to civil purposes, for there is a relation as to moral purposes, therefore he cannot marry his own mother or bastard sister.

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[67] **BILL OF EXCEPTIONS. See Evidence 10.**

BILLS OF EXCHANGE.

See Executor 10. Infant 12.

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1. NICHOLSON *v.* SELDNITH.

[Pasch. 9 Will. 3. C. B. 1 Ld. Raym. 180. S. C. named Nicholson *v.* Sedgwick.]

Difference between a bill payable to W. R. or bearer, and to him or order.

RULED, That where a bill is drawn payable to *W. R. or bearer*, an assignee must sue in the name of him to whom it was made payable, and not in his own name; for if the bearer was allowed to sue in his own name, then a stranger, who by accident may find the note, if lost, might recover: but if it is made payable to *W. R. or order*, there an assignee may sue in his own name, because the order must be made by indorsement, or the like, to shew the drawer's consent (*a*).

(*a*) *R.* 3 *Bur.* 1516. That an action may be brought by the bearer in his own name.

2. JORDAN *v.* BARLOE.

[Pasch. 12 Will. 3. B. R.]

Bill payable to W. R. or order, is within the custom of merchants.

RULED, That where a bill is drawn payable to *W. R. or order*, it is within the custom of merchants, and such a bill may be negotiated and assigned by custom, and the contract of the parties, and an action may be grounded on it, though it is no specialty; but if it is made payable to *W. R.* or * *bearer*, it is not within the custom of merchants; and therefore, when, upon such a bill, the plaintiff declared, that the defendant being a merchant, had drawn a bill according to the custom of merchants, but had not paid the money: this declaration was held ill; and all this was resolved in † *Hodges* and *Steward's* case.

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* Postea 5.

† 1 Salk. 125. Postea 5.

3. WILLIAMS v. FIELD.

[5 Will. 3. B. R.]

Where the last indorsee may bring an action against any of the indorsers. Bailey 42. Doug. 613. Bur. 670

RULED, That where a bill is drawn payable to *W. R. or order*, and he indorses it to *B.*, who indorses it to *C.*, and he indorses it to *D.*; the last indorsee may bring an action against any of the indorsers, because every indorsement, is a new bill, and implies a warranty by the indorser, that the money shall be paid.

4. CLERKE v. MUNDALL.

[3 Will. 3. *apud* Guildhall, *coram* Holt, *Ch. Just.* 1 Salk. 124. S. C.]

Where a bill indorsed, and not paid will not extinguish a precedent debt.

W. R. having a bill of exchange, and being indebted to *T. P.*, indorses the bill to him; afterwards he brought an *assumpsit* against *W. R.*, and upon *non assumpsit* pleaded, at the trial he gave evidence this bill of exchange indorsed to the plaintiff, and that it had been so long in his hands after it became due and payable, and therefore he accounted it as money paid: but *per Holt*, Ch. Just. a bill, without payment of the money, shall never go in satisfaction of a precedent debt or contract; if it is not part of the contract, that it should be in satisfaction; as if *A.* sells goods to *B.*, and it is agreed between them, that *A.* shall have a bill of exchange in satisfaction for the goods, in such case *B.* is discharged, though the money should never be paid, because the bill itself was payment; but otherwise a bill shall never extinguish a precedent contract or debt; it is true, if part of a bill of exchange is paid, it shall only be a discharge of so much of the old debt.

5. HODGES v. STEWARD.

[Pasch. 5 W. 3. B. R. 1 Ld. Raym. 181. this Case cited.]

1 Salk. 125. The plaintiff declared on a custom for the bearer to bring an action, if the defendant demurs and doth not traverse the custom, judgment shall be [ag]ainst him.

THIS case is reported in 1 *Salk.*; to which may be added, that this was an action on the case brought upon an *inland bill* of exchange, in which the plaintiff declared upon a *special custom in* London *for the bearer* to bring the action, &c. and upon a demurrer to the declaration, besides the other points adjudged in this case it was held, that the * defendant having demurred, without traversing the custom, he had thereby confessed there was such a custom, though in truth there was not, and for that reason the

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plaintiff had judgment; for though the Court takes notice of the *law of merchants*, as part of the law of *England*, yet they cannot take notice of the customs of particular places; and this custom, as set forth in the declaration, being sufficient to maintain the action, and the defendant confessing it by his demurrer, he hath given judgment against himself.

6. BROUGH *v.* PARKINS.

[Mich. 2 Annæ, B. R. 2 Ld. Raym. 992. S. C. 1 Salk. 131.]

Mod. Cases 80

Case against the drawer of an inland bill good, without a protest.

CASE upon an *inland bill* of exchange brought in the *C. B.* against the *drawer*, and judgment for the plaintiff by *nil dicit;* and now upon a writ of error in *B. R.* it was argued for the plaintiff in error, that the declaration was ill, because it did not appear therein that the bill was *protested;* and since the late *statute, no action can be brought against the *drawer*, unless a *protest* is made as directed by that statute, and this ought to be set forth in the declaration; because at common law the party had no remedy against the *drawer*, except notice was given to him of non-payment of the money by him on whom the bill was drawn: So that now a *protest* is necessary, or it is not; if it is necessary, it ought to be set forth in the declaration; if it is not necessary, then the party had the same remedy before the statute that he hath now, so that the statute is of no effect. On the contrary it was argued for the plaintiff in the action, that it doth not appear that the bill was underwritten; for if it was not, then it is not within the statute, and a *protest* cannot be made without it; for in cases of *inland bills*, a *protest* was not necessary at common law, as it is in foreign bills; but admitting a *protest* in this case is required by the statute, yet it ought not to be set forth in the declaration, but it is to be considered at the trial: For if the drawer had any damage by the not protesting it, and if such damage amounts to the value of the bill, it is a total discharge to him; if less, it is a discharge for so much. *Holt*, Ch. Just. The plaintiff must give convenient notice to the *drawer*, of non-payment of the money in cases of *inland* as well as of *foreign bills of exchange*, for if the drawer receives any prejudice by the plaintiff's delay, he shall not recover: A *protest* on a *foreign bill* is part of its constitution, but on *inland bills* it was not necessary before this statute, at common law; and the statute doth not take away the plaintiff's action for want of a protest, or make it a bar to his action, but only deprives him of that interest, or those damages for not making a protest, as he might have, if he had

*9 & 10 Will. 3. cap. 17.

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made one; or to give the drawer a remedy against him by way of action for costs and damages, in not making a protest, *quod Powell*, Just. *concessit*, and that since the statute a protest was never set forth in the declaration.

7. YEOMAN *v.* BRADSHAW.

Postea, executor 10. Bill of exchange is no specialty, therefore it shall be bona notabilia where the debtor is, and not where the bill is. Dyer 305. a. in marg. Offic. Ex. c. 4. s. 2.

PER Holt, Ch. Just. A bill of exchange shall be *bona notabilia* where the debtor is, and not where the bill is, for it is in law no specialty; for if an executor pays debts upon simple contracts, or suffers judgment to pass against him upon actions on such contracts, yet he may plead such payment or judgment in bar to an action on a *bill of exchange*, and such bill is like an award in writing, which is no chattel where the award itself lies; and in pleading such award or a bill of exchange, it is never said *hic in curia prolat,'* which shews they are no specialties, and so it was adjudged; though it was objected, that the paper on which it was written was evidence that it was a debt, and that trover and conversion would lie for it, and consequently it must be goods and chattels, and therefore ought to be considered as *bona notabilia*, where the bill or award was.

8. ANONYMOUS.

[Pasch. 2 Annæ, B. R.]

Action against the acceptor, where brought for part of the money, not good.

A BILL of exchange was drawn on *W. R.* for 40*l.* payable to *O. W.* or order; *W. R.* accepts the bill, and afterwards *O. W.*, the drawer, indorses *part of it* to the plaintiff, who brought an action against the *acceptor:* Adjudged that it would not lie, because, by his accepting the bill, he made himself liable only to one action for the whole, and not to several actions for part of the money (*a*).

(*a*) *R. ac.* 1 *Salk.* 65.

9. ANONYMOUS.

[Mich. 10 W. 3. S. C. 1 Salk. 126.]

Action doth not lie against the indorser, without setting forth an attempt to find out the first drawer, or a demand of the money of him.

A BILL of exchange being made payable to *W. R. or order*, *W. R.* indorses it; *B.*, the indorsee, cannot sue *W. R.* unless he attempt to find out the first drawer, or to demand it of him, for the indorser is but a warrantee that the drawer should pay, and therefore liable only upon his default: *Per Holt*, Chief Justice, at *Guildhall*, and such attempt must be set forth in the declaration (*b*).

(*b*) This case, as here stated, is not law. *Vide* note to the report of it in 1 *Salk.*

10. ANONYMOUS.

[Mich. 10 W. 3. at Guildhall. 1 Salk. 126. S. C.]

A BANK bill, payable to *W. R. or bearer*, was given to *W. W.*, who lost it, and it was found by a stranger, who assigned it to *C.* upon a valuable consideration; afterwards *C.* got a new bill in his own name. *Et per Holt*, Ch. Just., *W. R.* may have trover against the finder, for he had no title, though a payment to him had indemnified the bank; but not against *C.* because of the consideration, which, by course of trade, creates a property in the assignee or bearer (*a*).

Bill payable to bearer lost, and found by a stranger, who assigned to C., good, but trover lies against the finder.

(*a*) *Vide* references in the report, 1 *Salk.*

BISHOP.

1. ALL bishoprics in *England* were anciently *donative* by the king; and there was good reason for it, for he endowed them with lands and revenues, and baronies, and therefore it was reasonable he should be the patron. The ceremony then in use was investiture *per annulum & baculum;* the one was a symbolical representation of the bishop's spiritual marriage with the church, the other of his pastoral care and charge over the flock of Christ.

1 Salk. 344, 350.

1 Salk. 136.

2. But after many contests between the kings of *England* and the popes, it was * agreed, in the reign of *King John*, that the king should permit a free election by the chapter, but founded on his *conge d'eslire*, (*i. e.*) a license to give them leave to choose a bishop upon any vacancy, and that the new elected bishop should not have his temporalities, till he swore allegiance to the king; but that confirmation and consecration should be in the power of the pope, by which means he gained, in effect, the disposal of the bishoprics in *England*.

1 Salk. 136.

* The original charter of this agreement is in Mat Paris and in Eadmerus.

3. And thus it continued till the † 25th year of the reign of *H.* 8., in which year the papal jurisdiction was taken away by statute. *Quod, Vide.*

† 25 H. 8. cap. 30. 1 Salk. 136.

1 Ed. 6. cap. 1. Jones 160. Latch. 37.

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4. Afterwards, by the statute 1 *Ed.* 6., all *bishoprics* were made *donative*, as formerly they were; but by a statute made 8 *Eliz.* the statute 25 *H.* 8. was restored, and bishoprics in *England* were again made elective by the *conge d'eslire;* but in *Ireland* they are *donative* by letters patent at this day.

5. The manner of making a bishop, as well in case of translation as new creation, is thus:

When the see is vacant, the dean and chapter certify it to the king in Chancery, and pray the king's license to elect a bishop; thereupon the king grants his *conge d'eslire* (*a*) such a person naming him, and so they proceed to an election; and when that is done, they certify it to the king, to the archbishop, and to the party elected; and then the king by his letters patents gives the royal assent, and commands the archbishop to confirm and consecrate him; whereupon the archbishop examines the election, and the party, and then confirms the election, and consecrates him.

6. This is the manner of proceeding in *creations*, and it holds likewise in cases of *translations*, excepting only, that the person translated is not consecrated *de novo;* for a * consecration is like an ordination, (*i. e.*) it is an indelible character, and holds good for ever.

* Jones 160.

7. Heretofore, when a bishop was to be *translated*, there was no election to the new see, for the rule in the canon law is, *electus non potest eligi;* and because it was pretended, that the bishop was married to the first church, which marriage could not be dissolved but by the pope, therefore a petition was made to him, who consenting to it, then, and not before, the bishop was translated to his new see; and this was said to be by postulation, but rather it may be said to be by usurpation, for it is expressly against the statutes 16 *R.* 2. and 9 *H.* 4. *cap.* 8. and translations are ever by election, and not by postulation.

Jones 160.

Jones 162.

8. When a bishop is *translated*, the old see is not void by the election to the new one, until the election is confirmed by the archbishop; for though he is elected, yet the king may not consent, or the archbishop may not confirm, and it is not reasonable that the bishop should lose his old preferment, till he hath gained a new one; and so it is in case of creation, he is not completely bishop till consecration.

† See Serjeant Wilson's argument, in the case of Wolferston versus The Bishop of Lin-

9. For, as there are four things to complete a parson, (*viz.*) *presentation*, *admission*, *institution*, and † *induction*, so there are four things analogically requiste to complete the bishop; the first is *election*, and this resembles the *pre-*

(*a*) Q. Whether the *conge d'eslire* is not general, and the recommendation of a particular person a distinct instrument.

sentation; the next is *confirmation*, which resembles *admission;* the next is *consecration*, and this resembles *institution;* and the last is *installation* of a bishop, or *inthronization* of an archbishop, which resembles *induction*.

colo, 2 Wilson 181.

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10. Originally the archbishop was bishop over all *England*, as *Austin* was, *per Coke* and *Dodderidge*. 1 *Roll. Rep.* 328.

11. *Bishops* did sit and had a vote in parliament in the time of the *Saxons;* but it was not *ratione baroniæ*, but *ex privilego personali*, as they were bishops, for they were not *barons* till the *Norman reign;* for in the reign of the *Saxons*, they were free from all services and payments, excepting only to *castles and bridges;* but *William*, called the *Conqueror*, deprived them of this exemption, and instead thereof turned their possessions into baronies, and made them subject to the tenures and duty of knights-service.

Seld. tit. Honour, 576.

BONA NOTABILIA. See Executor 10.

BONDS.

1. CROMWELL *v.* DRESDALE.

[Mich. 8 Will. 3. 2 Salk. 462. S. C.]

PER Holt, Ch. Just. If the delivery of the bond was after the date, the plaintiff must declare generally of a bond dated on such a day, but with a *primo deliberat'* on such a day, for otherwise it shall be intended to be delivered on the day it is dated.

Where the plaintiff must declare on the delivery of a bond after the date.

2. HENDERSON *v.* FOSTER.

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[Hill. Will. 3. B. R. 2 Salk. 462. S. C.]

IN an action of debt the plaintiff declared on a bond *solvend' triginta & sex libras;* and upon *oyer* of the bond it appeared, *solvend' sex triginta libras*, which is six times

Where sex triginta shall be taken as one word.

as much as the plaintiff had declared for (*viz.*) 180 *l.*; and for this variance the defendant demurred to the declaration, but it was held good; for *sex tringint'* shall be taken as one word, like a bond dated *tres viginti dies*, which was taken to be on the 23d day, *&c.* (*a*).

(*a*) *Vide Comyns*, Obligation, B. 3. where similar decisions appear in many other cases.

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3. BOUGHTON *v.* SHAW.

[Pasch. 5 Will. 3.]

Bond given to the plaintiff himself to appear, &c. is not within the statute.

DEBT upon bond conditioned, that whereas *W. R.* was arrested at the suit of the plaintiff, if therefore he the said *W. R.* should appear, and put in bail at the return of the writ, or surrender himself to the sergeant, then the bond should be void. The defendant pleaded the statutes of *H.* 6., and that this bond delivered to the sergeant, and taken by him in the name of the plaintiff, was for ease and favour; and upon a demurrer to this plea, *per Curiam*, a bond given by the party arrested, to the plaintiff himself, or by a stranger, to the plaintiff himself, for the enlargement of the party arrested, is not within the statute, but good.

Vide 2 Str. 893.

Allen 21, 42. Saund. 291. Jones 303. Sid. 234, 272, 420. 2 Leon. 220. Str. 503.

4. Three joint obligors, an action was brought against two, they may plead *in abatement*, that another sealed the bond, who is still alive, and not named; so it is of a recognizance before a mayor or recorder, but they cannot crave *oyer* and demur for variance, for perhaps all three did not seal, and so the Court will intend; but it is otherwise of a recognizance before a judge; for in a *scire facias*, the defendant may either plead it in abatement, or crave *oyer* and demur for variance.

Sid. 238.

5. So where there are three joint obligors, and one of them dies, the plaintiff must shew that one is dead, for otherwise he cannot sue the two survivors and the executor of him who is dead.

Yelv. 177.

6. Where a bond is made to *A.*, *B.*, and *C.*, conditioned that *W. R.* shall pay 20 *l.* to *W. W.*, there all of them must join in the suit, for they are but as an obligee; and if one of them should die, the two survivors must join in the action, though they have no interest in the money.

Vide 1 Sho. 8. Cro. Eliz. 202.

1 Lev. 35.

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7. *Two seal and deliver a bond to *W. R.* and afterwards by consent of all parties a third is added, and he seals and delivers the bond: Adjudged this did not make the bond void, but that all three now are bound; but it had been otherwise (*a*) had the third man been added without the consent of the obligee.

(*a*) It should seem that this distinction only applies to the third being bound, and not to the validity of the bond against the others.

8. Debt upon a bond of 50*l.*, which upon *oyer* appeared to be in *quanto ginta libris;* adjudged ill, because of the variance and insensibility of the word.

2 Lev. 166. Vide Comyns, Obligation, B. 3.

9. Three were jointly and severally bound, and an action of debt being brought against one of them alone, he craved *oyer* of the bond, and pleaded that the seal of one of them was torn off; and upon a demurrer this was adjudged a good plea, because it is not the same bond as it was at first.

2 Lev. 220. 5 Co. 22.

10. Debt upon bond, in which the plaintiff declared, that the defendant was bound to him the plaintiff *W. R.* in 50*l.*; upon *non est factum* pleaded, the jury found the bond *in hæc verba*, and that it was made to *W. R.*, and that the words *nuper vic. Oxen'* were since interlined: *et per Curiam*, the interlineation might be material, but it doth not appear to be so; for *non constat*, whether it was to him, or not, *colore officii*, and therefore the verdict is for the plaintiff; but if instead of *non est factum*, the defendant had craved *oyer* and demurred, then it had been against the plaintiff for this variance.

1 Roll. Rep. 43.

11. PLACKET *v.* GRESHAM.

[Mich. 9 Will. 3.]

IN this case it was held, that where a sheriff takes a bond as a reward for doing a thing, it is void, for it may be to warrant him in the breach of his duty; but if it is to save him harmless in doing a thing which it is his duty to do, then it is good.

Where a bond taken by a sheriff is good; where not. Vide 2 Burr. 924. 1 Bl. 201. Cro. Jac. 103. 1 T. R. 418.

BY-LAWS.

[76]

1. IN all corporations there is a special clause, by which they have power to make by-laws; but such enabling clauses are needless, because they are included in the very act of incorporating, as a power to sue, purchase, or the like; for as the natural body has reason to govern itself, so bodies incorporate must have laws, which are in nature of political reason to govern themselves.

Hob. 211.

Hob. 211. 5 Rep. 61. Mo. 579.

2. The inhabitants of a town or parish may make by-laws for *repairing their church or highways*, and this without any *custom or prescription* so to do, because these are necessaries to which the law hath made them subject as they are a parish; and therefore the law enables them to supply these occasions, as if they were incorporated; but they cannot make a by-law for *regulating a common*, without a custom enabling them so to do, and such a custom must be pleaded.

1 Vent. 167.

3. But a by-law in a *manor* binds all the tenants of that manor, because they are supposed to dwell there.

1 Roll. Rep. 3. 11 Co. 53. The Taylors of Ipswich case.

4. A by-law that none shall exercise his trade in such a vill, until first allowed so to do by such or such persons, is not good, because it is in the power of these persons to hinder him.

1 Roll. Rep. 312. Roll. Abr. 365.

5. But a by-law in *London* not to use a *hot-press*, under the penalty of 5*l.*, nor to make one under the penalty of 10*l.*, is good, because it is dangerous in respect of firing, and it is a deceit to the buyers.

6. A by-law under such a penalty, and whosoever shall refuse to pay it, to be *committed*, is naught, because *nullis liber homo imprisonetur nisi per legale judicium*, and no assent can change this law; but if the by-law had been, that the penalty should be levied by distress, an action of debt would have laid; 5 *Rep.* 64. *Clerk's* case; but not to be levied by distress and sale of goods.

2 Vent. 183. Comb. 10.

Jones, 162.

7. The town of *Boston*, by their charter, claimed a power to make by-laws or orders, and to *commit* for not obeying them; and this in a *quo warranto* was held to be ill, according to *Clerk's* case.

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Hob. 211. 5 Rep. 63.

8. All by-laws must be subject to the laws of the realm, and subordinate to them; therefore, if they are against the laws and statutes, they are void.

BRIDGES.

1. THESE are to be repaired by the county, unless the *locus in quo, &c.* is bound to repair it, and that may be by *toll* or *tenure*, but not by *prescription;* but if it lie part in one county and part in another, each county is respectively chargeable for so much of the bridge as lies therein,

and that may be by *toll*, *tenure*, or *prescription*; or unless some private person is bound to repair it, and that may be by *toll* or *tenure*, but not by prescription.

2. Indictment for not repairing a bridge was adjudged naught, because *non constat* in what county it lies, and because it did not set forth what kind of bridge, (*viz.*) whether *foot*, *horse*, or *cart bridge*, and because it charged the defendant *ratione manerii sui*, when it should be *ratione tenuræ manerii sui*, so that it did not appear that he was owner of the manor.

Sties 101. Spiller's case. Vide 1 Salk. 359. 2 Ld. Raym. 1174.

3. Information against the inhabitants of the county of *Nottingham*, for not repairing a bridge over the *Trent*; two of the inhabitants, in the name of themselves and the rest, pleaded, that *A.* and *B.*, owners of *White-acre*, ought to repair it *ratione tenuræ*, and traverse that the inhabitants of the county have or ought to repair: The attorney-general replied, that the inhabitants, &c. ought to repair it, and traversed that *A.* and *B.* ought; they rejoin, that *A.* and *B.* ought to repair, and thereupon they were at issue; and at a trial by a *Middlesex* jury, the defendants were found guilty upon the last traverse, *quod nota*.

2 Lev. 112.

The defendant, as lord of a manor, used to repair *Lodden-bridge*, he aliened the manor to several, (*viz.*) part to *A.* and part to *B.*, and afterwards *B.* was indicted for not repairing this bridge as he ought *ratione tenuræ*; he pleaded, that *A.* and the other were purchasers with him of the same lands held of that manor: *Sed per Curiam*, We will compel you to repair this bridge, because it is a thing of necessity, and afterwards you may seek for contribution amongst the rest, for the repairing shall not stay till you determine who shall be contributors.

Jones 273. 1 Salk. 358.

[78]

CERTIORARI.

1. THE QUEEN *v.* DIXON.

[Mich. 2 Annæ, B. R. 2 Ld. Raym. 971. S. C.]

THERE is a short note of this case in 1 *Salk.*, which see; the case was thus:

1 Salk. 180. Mod. Cases 61.

ss. The defendant was indicted for selling five yards of *muslin*, affirming it to be worth 5*s.* *per* yard, whereas it

Certiorari to remove the indictment, but not the conviction.

was not worth 2s. 6d. *per* yard; upon not guilty pleaded, the defendant was found guilty, and afterwards brought a *certiorari*, and moved to quash this indictment: *sed per Holt*, Ch. Just. This *certiorari* was only to remove the indictment, and not the conviction; besides, here is no day in court for the defendant, as it ought to be upon the return of a *certiorari*, to remove an indictment *after conviction*, he should have made use of this *certiorari*, *before conviction*, whereupon he now moved for a *certiorari* to remove both the indictment and *conviction*; though a *writ of error* might have been proper, yet the Court granted a *certiorari* specially giving a day here by it to the party.

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2. THE QUEEN *v.* BROWN & AL'.

[Mich. 12 Annæ, B. R. 1 Salk. 146. S. C.]

Joint indictment against 3, another indictment against one of the 3, and another against 2 of the 3 and a stranger, and a certiorari to remove all indictments against the three without saying vel eorum aliquis. 2 Hawk. ch. 27. s. 85.

WILLIAM Brown, *Francis Wood*, and *Leonard Fosbrook* were *jointly* indicted at the sessions; there was another indictment against *Brown* alone, and another against *Wood* and *Fosbrook*, and one *W. R.*; and a *certiorari* was awarded to remove all indictments, *unde iidem Willielmus*, *Franciscus*, & *Leonardus indictati sunt*, without saying, *vel eorum aliquis indictatus existit*: and *per Curiam*, none of these indictments *are removed, but only that joint indictment first mentioned against *Brown* and others, and the justices below may proceed on the other without any contempt.

[*79]

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3. ANONYMOUS.

[Mich. 8. Annæ. 1 Salk. 145. S. C. Faresley 97.]

An order was made concerning foreign salt, and the certiorari was to remove an order concerning salt.

CERTIORARI to remove an order made upon *W. R.* concerning *foreign salt*, and the order being returned, it appeared to be for *salt only*; and a motion being made to quash the order for a fault therein, the *Attorney-General Northey* objected against the *certiorari*, that it was misconceived, for there was no such order to be removed; *quod Curia concessit*; for a *certiorari* to remove an order made concerning *foreign salt*, will not remove an order made concerning *salt* generally, it should have been to remove all orders concerning *W. R.*; for which reason it was quashed.

4. CROSSE v. SMITH.

[Hill. 1 Annæ, B. R. 2 Ld. Raym. 836. S. C.]

1 Salk. 148. S.C. No jurisdiction can withstand a certiorari. Farcs. 138. S. C.

UPON a *certiorari* out of the Common Pleas to the Court of *Ely*, and this writ being allowed by the Court, and they afterwards proceeding thereon, a writ of error was brought, and that matter was assigned for error. The defendants plead a grant of *conusance of pleas to the Bishop of Ely*, and an allowance thereof in *B. R. anno* 21 *Ed.* 3., and that the cause did arise within that jurisdiction; and this being returned on the *certiorari*, and a demurrer to it, *Holt*, Ch. Just. held that there are three sorts of inferior jurisdictions.

1. One whereof is *tenere placita*, and this is the lowest sort, for it is only a concurrent jurisdiction, and the party may sue there, or in the king's courts if he will.

2. The second is *conusance of pleas*, and by this a right is vested in the lord of the franchise to hold the plea, and he is the only person who can take advantage of it; for the defendant cannot plead this to the jurisdiction of the court, but the lord must come in and claim his franchise, and there is no other way to get the cause from him; neither is the court of *B. R.* entirely outed thereupon, for day is given by the roll in *B. R.* to the party to be below at such a day, where both parties are sent down together, with the tenor of the record here, for them to proceed there; and if justice is done it is well, if not, the plaintiff shall have a resummons for any delay or misbehaviour below, for the cause is still under the authority and inspection of this Court, and the lord's benefit is all that is to be considered; it is true, these jurisdictions are a grievance, and complaints have often been made against them, and the common law, to prevent oppression, hath always allowed *certiorari*'s to these jurisdictions.

27 H. 8. cap. 24

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3. The third sort is an *exempt jurisdiction*; as where the king grants to a great city, that the inhabitants thereof shall be sued within their city, and not elsewhere; this grant may be pleaded to the jurisdiction of this court, if there be a court within that city which can hold plea of the cause, and nobody can take advantage of this privilege but a defendant, for if he will bring a *certiorari*, that will remove the cause; but he may waive it if he will, so that the privilege is only for his benefit.

Thus there is no jurisdiction which can withstand a *certiorari*, even in a case of a customary proceeding by foreign attachment; if the defendant cannot find bail below, he may bring a *certiorari*, and upon putting in bail above, the cause shall go on there.

5. PARISH OF ST. MARY IN DEVISES.

[Pasch. 1702. 1 Salk. 147. S. C.]

Certiorari to remove an order cujus quidem tenor, instead of ordo, not good.

UPON a *certiorari* to remove an order, the return was, *cujus quidem tenor sequitur in hæc verba;* when it should be *qui quidem ordo sequitur in hæc verba;* and for that reason it was quashed, and, upon motion, a new *certiorari* was granted.

6. THE QUEEN *v.* WHITTLE.

[Pasch. 1 Salk. 150. S. C. by the name of K. *v.* White.]

Certiorari to remove an order need not be signed by a judge, but the fiat must.

CERTIORARI to remove an *order of sessions* was *superseded*, because *emanavit biduo antea aliquid fiat* was signed by a *judge;* for, *per Curiam*, if it be to remove an indictment, both *certiorari* and *fiat* ought to be signed, if to remove an order, the *certiorari* need not be signed, but the *fiat* must.

7. ANONYMOUS.

Variance between the indictment, and the certiorari. Antea 3. 2 Asa. 3. 2 Hawk. ch. 27. s. 82.

CERTIORARI to remove an indictment de duobus equis felonice abductis, and the indictment was, *de uno equo furtive abducto. Per Curiam:* Nothing is before the Court, neither have they any warrant to proceed in this case, for there is a variance between the indictment and the writ.

[81]

CHALLENGES.

1. CHARNOCK'S *CASE.*

Where three may join, or sever in their challenge.

CHARNOCK, *King*, and *Keys*, were indicted for *high treason*, in conspiring the death of the king; they were denied counsel, but allowed *pen*, *ink*, and *paper;* and having severally pleaded not guilty, *Holt*, Ch. Just. told them, that each of them had liberty to challenge *thirty-five* of those who were returned upon the pannel to try them, without shewing any cause; but that if they in-

tended to take this liberty, then they must be tried separately and singly, as not joining in the challenges; but if they intended to *join in the challenges*, then they could challenge but thirty-five in the whole, and might be tried *jointly* upon the same indictment; accordingly they all three joined in their challenges, and were tried together and found guilty.

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2. ANONYMOUS.

RULED, That where there is a writ of inquiry for damages, the jurors cannot be *challenged*, as other jurors may, because this is only an inquest of office; but yet it is in the discretion of the sheriff to admit such a challenge, if it appear to be a good cause of challenge.

Jurors in a writ of inquiry cannot be challenged.

3. *Challenge to the array*, for that the sheriff had not taken the *test. Sed per Curiam*, this is no good cause of challenge, for he is still sheriff *de facto* and it would be very hard for plaintiffs in every trial to prove, that the sheriff had taken the *test*.

2 Vent. 58. 1 Cro. 369.

4. When the jury are of a town corporate, it is no challenge, that they are not freeholders; but where they are not of any corporation, it is a good challenge.

1 Vent. 366.

5. Information against the defendant for *forgery*, one of the jurors was challenged, for that the prosecutor was lately entertained at his house, and this was allowed a good challenge to the favour.

1 Vent. 309. 1 Cro. 663.

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6. *Information of intrusion*; a juror was challenged for want of *freehold*, he having only 15*s. per annum: But per Curiam*, any freehold was sufficient at common law; and though the statute of *H.* 5. requires 40*s*., and the 27 *Eliz.* 1 *l*., where the damages exceed 40 marks, yet this is only between party and party, and not where the queen is concerned (*a*).

1 Cro. 413. Sir Christopher Blount's case.

(*a*) By 4 & 5 *W.* & *M. ch.* 24. Jurors, in criminal cases as well as civil, are required to have freeholds of 10 *l*. a year.

CHANCERY.

1. MATHEWS *v.* COURTHOPE.

The testator made a stranger, and no relation to him, executor, and gave him 50 l. he shall not have the residuum. See 1 Wilson 285.

THE testator made one executor, who was no relation to him but a mere stranger, and gave him 50 *l.* for his care in the execution of his will; the plaintiff being next of kin, exhibited his bill for the *residuum* of the estate, and no counsel appearing on the other side, he had a decree *nisi causa.* For *per Turton*, Just. with whom the bar agreed, the executor in such case shall not have the *residuum*, after debts and legacies paid, but the next of kin to the testator; and so it was said it had been decreed in the like case, between *Cordall* and *Cordall;* it is true, if the executor had been nearly related to the testator, it might have been otherwise; but even in such case, if there are other relations, in equal degree with him, and are poor and indigent, equity in such doubtful cases, will give the *residue* amongst them (*a*).

(*a*) The doctrine on this subject is contained in the very able and comprehensive note of Mr. Cox, on the case of *Farrington* v. *Knightley*, 1 *P. Will.* 549. To the cases therein cited, may be added *Middleton* v. *Spicer*, 1 *Bro. Cha.* 202., wherein it was determined, that under the circumstances which entitle the next of kin to the surplus, in exclusion of the executors, the crown is entitled in case there are no next of kin.

2. ASTON *v.* ADAMS.

[Pasch. 8 Will. 3.]

Prohibition to the plaintiff in Chancery, who had brought a bill on an indebitatus assumpsit.

[83]

MOTION for a prohibition to one *Adams*, who had exhibited a bill in Chancery: The case was thus; *Aston* stood engaged to *Adams* by simple contract, to pay him 10 *l.* for curing his son, *&c.*, and that *Adams* brought a bill in Chancery for this 10 *l.* suggesting that the agreement was *not in writing*, and that the witnesses who could prove it were either *dead or beyond sea;* the defendant *Aston* pleaded, that the agreement was made in the presence of *W. R.* now living in *Holland*, and traversed the rest of the suggestion; and this being over-ruled in

Chancery, *Aston* now moved for a prohibition, because this is no more than a mere *indebitatus assumpsit* at common law; and if this proceeding should be allowed, it would tend to the subversion of the whole frame of the common law; beside, the granting a prohibition would prevent the clashing of jurisdiction; and there are several precedents in the Register of prohibitions, *ne sequatur sub suo periculo:* The Court appointed to hear counsel on both sides, but the cause was agreed (*a*).

1 Ch. Rep. fo. 63.

(*a*) There seems no case of a prohibition to the court of Chancery; and in *Raymond* 227. it is doubted whether such will lie.

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3. ANONYMOUS.

[Hill. 9 Will. 3.]

Mortgages and judgments to be paid by sale of lands, and bonds and debt on simple contract out of the personal estate.

THE testator being seised of lands, and *possessed of goods*, devised *Black-acre to be sold*, and *White-acre to be mortgaged*, for payment of his debts, and died so much in debt, that if both parcels were sold, the money arising by such sale would only pay the debts, with a small overplus, accounting also the money arising by the sale of his *goods and chattels;* in this case it was decreed, *that all should be sold*, that the mortgages and judgment should be first satisfied, and that afterwards, if there should be sufficient of the *personal estate to pay the bonds*, then to pay the same, or so much of them as the *personal estate* would extend to pay; and that so much of the bonds as should remain unpaid should come in in equal degree with the debts upon simple contract, and be a charge upon the lands, for as to them, bonds have no preference in a court of equity; it is true, as to goods and chattels, bonds will have a preference, because, the executor by law is bound to prefer them before the debts on simple contract (*b*).

(*b*) *Vide* note about marshalling assets, 2 *Salk.* 416.

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4. FEVERSTONE *v.* SCETLE.

[Hill. 1697.]

Debts upon simple contract to be satisfied out of the equitable estate.

DECREED, by *Somers* Lord Chancellor, That where a real estate is upon an *equitable title* made subject by this Court to the payment of debts, and it appears that there is a sufficient *legal estate*, (*i. e.*) *goods and chattels*, to satisfy debts upon specialties, for which the creditors may have remedy at law against the executor; in such case the debts upon simple contract, for which there is no remedy at law, shall be first satisfied out of the equitable estate.

5. POPE & AL' v. GARLAND.

[Pasch. 11 W. 3.]

Devise of copyhold good without a surrender. Vide 1 Salk. 187.

DECREED, That all devises by copyholders, for the use of children or creditors, and all charges made by them upon their lands, for the benefit of children or creditors, will be good in a court of equity, though there was no *surrender* to these uses.

6. PHILLIPSON v. PHILLIPSON.

[Hill. 3 Will. 3. B. R.]

Where an heir shall be relieved against the penalty of a bond.

DEBT against an *heir* upon the bond of his ancestor: The defendant pleaded *riens per descent*, and at the trial it was found against him, that he had 5*l*. assets *per descent*, the Chancery will relieve him against the penalty of the bond, but not against the penalty of his false plea, because it was a voluntary falsity.

7. ANONYMOUS.

[Hill. 9 Will. 3.]

Where more money is lent to the mortgagor on bond, he shall not redeem without paying the bond.

DECREED, by *Somers*, Lord Chancellor, That where the mortgagee lends more money upon bond to the mortgagor, he shall not redeem till he pays the bond-debt as well as the money due on the mortgage; but if he mortgage his *equity of redemption* to another, the second mortgagee shall not be affected with the bond, for it is but a personal charge upon the mortgagor (*a*).

(*a*) *Vide ac. Coleman* v. *Winch*, 1 *P. Wms* 775. *Shuttleworth* v. *Laywick*, 1 *Vern.* 245. *Powis* v. *Corbett*, 3 *Atk.* 556. *Troughton* v. *Troughton*, 1 *Vez.* 87. *Holmes* v. *Bunce*, 3 *Atk.* 60. *Lowthian* v. *Hassel*, 3 *Bro. Ch. Rep.* 162. From these cases, it appears, that the mortgagee may tack his bond against the mortgagor, his heir, or beneficial devisee, but not against creditors, trustees for creditors, or other persons entitled by a valuable consideration.

8. ANONYMOUS.

Bill against a man and his wife abated by the death of him.

A BILL was exhibited against husband and wife, for matters chiefly concerning the wife; they both put in their answer, and then the husband died; this is an abatement of the cause, so that the plaintiff shall not proceed upon

a *bill of revivor*, for the widow shall not be compelled to abide by the answer of her husband made for her, or which he made whilst she was *sub protestate viri*, but she may abide by it if she will, and if she doth, the plaintiff may proceed, and the decree shall bind her.

9. ANONYMOUS. [85]

A BILL was exhibited to discover a title, and whether there was an equity of redemption; the defendant answered, that he was a purchaser for a valuable consideration, and absolutely bought the estate of such a person, and had no notice of any title; and this was adjudged a good plea. See *Hardres* 510.

Purchase for a valuable consideration without notice of any incumbrance, a good plea.

10. DARRIS'S *CASE*.

A MAN contracted for the purchase of lands, but before the conveyance was made *he died*, having devised the land, &c. *Et per Curiam*, the devise is good, because the vendor, after the contract, stood trustee for the vendee.

Contract for a purchase, and before the conveyance made, he died, the vendor is a trustee for the vendee. Vide Gilb. Ch. 243. Ld. Pembroke v. Boden, Ch. Rep. 115. Powell on Contracts, 2 vol. 83.

CHURCH AND CHURCHWARDENS.

1. IN a *prohibition* it was ruled, That the plaintiff cannot entitle himself to a *seat in navi ecclesiæ* by *prescription* generally, without shewing some special matter, as *repairing*, &c. otherwise if it be an *isle*, but if he entitle himself to a seat *in navi ecclesiæ* generally, he must give *repairing* in evidence, but an isle may be upon the land of a private person.

Seats in the church. Sid. 88, 203. 1 Lev. 71. 1 Wilson 326.

2. In trespass for breaking and cutting in pieces his pew, and taking it away; the defendants pleaded, that they were *churchwardens*, and that the plaintiff had built it in the church without licence, *per quod*, &c. *Et per Curiam*, the trespass is confessed, for though they may

Noy 108. Gibson's case.

remove the *seat*, they cannot cut the timber and materials into pieces.

Noy 104. Day's case.

3. If one and his ancestors have, time out of mind, repaired an *isle in a church*, and sate there with his family, and buried there, it is good *evidence* that the *seat* is proper and peculiar to him, but then he must repair it at his own charge, and not with the help of the parish, for if he doth not, the ordinary may appoint who shall sit there.

[86]

Noy 133. Sir W. Hall's case.

4. The chief seat in the chancel belongs to the impropriator of common right; and by consequence to the farmer of the impropriate tithes, but by prescription it may belong to another.

Burials. Noy 145.

5. The church book for burials and christenings began in the thirtieth year of *H.* 8. at the instance of Lord *Cromwell.*

Noy 104.

6. The ordinary and churchwardens cannot license one to bury in the church, but it ought to be by the parson, because the freehold is in him.

7. ANDERSON *v.* WALKER.

2 Lutw. Custom to pay for baptism and burials, triable at law. *Cap. 13.

ALL offerings which are due to the vicar for *sacraments marriages*, and *burials*, and payable to him by the *laws and customs* of the realm, are confirmed by the statute *2 *Ed.* 6. but then such *custom* must be tried in the temporal courts; therefore, where the curate of *Bridlington* libelled against *T. S.* for not paying a shilling for *baptizing* his child, setting forth in his libel a custom in the said parish for every parent so to do, *&c.*; the defendant suggested for a prohibition, that by law no man ought to pay for baptizing his child, *&c.* against his will, that customs and prescriptions were properly triable at law, and that the curate, *&c.* had libelled against him, *&c.* setting forth the custom as aforesaid, and a prohibition was granted.

8. THOMPSON *v.* DAVENPORT.

2 Lutw. Custom to pay money for marrying, triable at law.

SO where the plaintiff libelled against the defendant, setting forth a *custom* in the parish of *Elington* in *Derbyshire*, that every woman, who is a parishioner, and dwelleth there, and *marrying with a license*, their husbands at the time of the marriage, or soon after, shall pay to the vicar 5*s*. as an accustomed fee, and so brings his case within that custom; the defendant suggested for a prohibition, that all customs are triable at common law, and that the plaintiff had libelled against him, setting forth the custom as aforesaid, *&c.* and a prohibition was granted.

9. PARKER v. CLERKE.

Mod. Cases 252. Where the spiritual court hath not an original jurisdiction, it is never too late to move for a prohibition.

THE *clerk of a parish* libelled against the churchwardens, for so much money due to him by *custom* every year, and to be levied by them on the respective inhabitants in the said parish, and after sentence in the spiritual court, the defendants suggested for a prohibition, that there was no such custom as the plaintiff had set forth in his libel; it was objected, against granting the prohibition, that it was now too late, because it was after sentence, especially since the custom was not denied; for if it had, and that court had proceeded, then, and not before, it had been proper to move for a prohibition. But *per Holt*, Ch. Just. it is never too late to move *B. R.* for a prohibition, where the spiritual court had no *original jurisdiction* (*a*), as they had not in this case (*b*), because a *clerk of a parish* is neither a spiritual person, nor is this duty in demand *spiritual*, for it is founded on a *custom*, and by consequence triable at law; and therefore the clerks may have an action on the case against the churchwardens, for neglecting to make a rate, and to levy it, or if it had been levied, and not paid by them to the plaintiff.

(*a*) *Vide ac.* 2 *Bur.* 813. *Cowp.* 424. 3 *T. R.* 3. 2 *Inst.* 602.

(*b*) *Vide ac. Doug.* 629. 5 *Mod.* 238. 1 Ld. *Raym.* 703.

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10. THE CHURCHWARDENS OF ST. BARTHOLOMEW'S *CASE*.

[Mich. 12 Will. 3. B. R.]

The archbishop or bishop must license a lecturer; but they cannot determine his right to the place. 1 Wilson 11.

ONE *Fishburne* left 25 *l. per annum* for the maintenance of a weekly lecturer, and appointed, that the lecturer should be chosen by the parishioners, and to preach on any day in every week as they should like best. The parishioners fixed on *Thursday*, and chose a lecturer every year; and now Mr. *Turton* being lecturer, and the parish having chosen Mr. *Rainer*, the other would not submit to the choice, whereupon the churchwardens shut *Turton* out of the church; afterwards the *Bishop of London* determined in his favour, and granted an *inhibition and monition* for that purpose. And *per Holt*, Ch. Just. a prohibition was granted to try the right; it is true, a man cannot be a *lecturer* without a *license from the bishop or archbishop;* but their power is only as to the qualification and fitness of the person, and not as to the right of the lectureship, and the Ecclesiastical Court may punish the churchwardens, if they will not open the church to the person, or to any one acting under him, but not if they refuse to open it to any other.

11. THE QUEEN *v.* GUISE.

[Mich. 2 Annæ. 2 Ld. Raym. 1008. S. C.]

6 Mod. 89. Return of a mandamus, that the churchwardens were not debite electi, without saying nec eorum aliquis, not good. 2 Stra. 1045. Vide 2 Salk. 433.

A *MANDAMUS* was granted to swear two *debite electi churchwardens of, &c.* The return was, that they were not duly elected, but did not say, *nec aliquis eorum*, and for that reason it was quashed, for he who makes the return must comply with the writ as far as he can, and if one of the two is duly elected, as where the parish claims a right to choose one churchwarden, and the parson another, they ought to swear one, and to return the special matter as to the other; that if the parishioners have only a right to choose one, and they choose two, the election is void: but if two are chosen by the parish by equal voices, when they ought to choose but one, in such case they cannot tell which to swear into the office, but then they may return all this special matter; so if the parishioners are to choose and present them to the parson who is to choose one of them, and they both bring a *mandamus*, that matter may be returned, for they cannot tell which to swear.



12. BRITTON *v.* STANDISH.

[Trin. 3 Annæ.]

Mod. Cases 182. 1 Salk. 166. S.C. A parishioner is not bound to come to his own parish church, if he goes to any other.

STANDISH, the parson of *H.* libelled against *Britton*, for not coming to his parish church on *Sundays*, and for not receiving the *sacrament at Easter:* the plaintiff suggested for a prohibition, that the bounds of parishes and the constructions of statutes belonged to the jurisdiction of the temporal courts, *&c.* The question was, Whether a parishioner is bound by law to come to his own parish church, or whether he is excused if he go to some other church, as it appeared the plaintiff did? It was insisted against the prohibition, that by the statute * 1 *Eliz.* every parishioner is obliged to come to his *parish church*, which statute is still in force, and not altered by any subsequent act, but only by the act of *toleration* in respect to dissenters; on the other side it was admitted, that the words of the statute 1 *Eliz.* are, *that every parishioner shall repair to his parish church*, but that those words were corrected or explained by some subsequent statutes; as for instance, by the statute † 3 *Jac.* by which every parishioner is required to repair to his parish church, *or to some other church;* it is likewise corrected by the act of *toleration. Holt*, Ch. Just. *parishes* were instituted for the ease and benefit of the people, and not of the parson;

* 1 Eliz. cap. 2. par. 14. Law. 8, 143, 184, 227. Spar. 78.
† 3 Jac. 1. cap. 4. par. 27. Spelm. Concil. 1 Part 193. 2 Part 141. 1 And. 138. 2 Cro. 480.

and if every parishioner is obliged to go to his parish church, then the gentlemen of *Gray's-Inn* and *Lincoln's-Inn* must no longer repair to their respective chapels, but to their parish churches, otherwise they may be compelled so to do by ecclesiastical censures. But *per Powell*, Just. The spiritual courts have always exercised this jurisdiction, and after so long usage, it ought not now to be questioned; and as for the *gentlemen of Gray's-Inn and Lincoln's-Inn*, they have likewise used to repair to their chapels, and therefore may be exempted from coming to their parish churches, and this by virtue of an usage against usage: now the reason why parishioners must come to their parish churches is not (as hath been observed) for the benefit of the *parson*, or that he may have his offerings, but because he having charged himself with the cure of their souls, he may be enabled to take care of that charge. But at another day, *Holt*, Ch. Just. held, that if a man repaired to any other chapel, it would be a good excuse for his not coming to his parish church, but then he must plead it; he likewise held, that if *Britton* the plaintiff in this prohibition was a professed churchman, and his conscience would permit him sometimes to go to the meetings of dissenters, that the act of *toleration* would not excuse him for not coming to church, for that act was not made to give ease to *such people;* so a rule was made for a prohibition, and that the plaintiff should declare on it, that the matter might come judicially before the Court.

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2 Roll. Rep. 455. Hard. 406, 467, 502.

13. HARMAN v. RENEW.

[Trin. 7 Will. 3. B. R.]

IN this case, which see in 1 *Salk.*, it was held, That at common law two churches might be *united* by the concurrence of the *patron*, *parson*, and *ordinary;* it was farther held, that though in such case there is but one parson to both churches, yet the two churches remain, and the two patronages, and the two parishes. But where they are *united by act of parliament*, as in the principal case, the parish of St. *Mary Bothaw* was *per statute* 22 *Car.* 2. *united to the parish of* St. *Swithin*, and the question arising, whether after such union the parishioners of St. *Mary Bothaw* should contribute towards the repair of the parish church of St. *Swithin*, it was adjudged, that they should; because where two parishes are united by act of parliament, one of those two parishes is extinct, and both patrons present but as to one church, though it is *alternis vicibus*.

1 Salk. 167. Of the uniting two parishes. S. C.

22 Car. 2. cap. 11.

14. KING *v.* RICE.

[1 Ld. Raym. 138. S. C.]

5 Mod. 325. Churchwardens, how chosen in London, or elsewhere.

IN *London* both the churchwardens are chosen by the parishioners; in other places the *parson* appoints one, and the parish the other (*a*). *Per consuetudinem Angliæ*, they are sworn and admitted by the *archdeacon*, and though they are unfit, he cannot refuse them (*b*).

(*a*) Of common right, this is the mode of election, *Str.* 1246.; but by custom it may be otherwise, 2 *Cro.* 532.

(*b*) *Vide ac.* 1 *Salk.* 166.

CITATION.

1. THE BISHOP OF ST. DAVID'S *CASE.*

[Hill. 10 Will. 3. B. R. *See* 1 Burn. Eccl. Law. *Title* Citation.]

5 Mod. 433. Archbishop hath a provincial power over all the bishops of his province.

THE *bishop of St. David's* was sued before the *archbishop of Canterbury for simony*, and was cited to answer at *Lambeth*, and not at the *Arches*, and it was to appear there before the *archbishop* himself, and not before his *chancellor or vicar-general*, and for these reasons he moved for a prohibition; but the Court denied it, because the *archbishop* hath a *provincial power* over all the *bishops of his province*, and may hold his court where he will, either at the *Arches* or elsewhere; and he may likewise convene the party before himself, and judge himself, and so may any *other bishop*, for the power of a chancellor or vicar-general is only a delegated power in ease of the bishop.

2. MACHIN *v.* MOULTON.

[Hill. 11 Will. 3. B. R. 1 Ld. Raym. 452. S. C. 2 Salk. 549. S. C.]

5 Mod. 450. For subtracting tithes, the party shall be sued in the diocese where subtracted.

MOULTON was parson of *S.* in the diocese of *York*, within which parish *Machin* had lands, but *lived in Lincoln* in another diocese, and now coming to *York*, *Moulton* sued him in the spiritual court there, for *subtrac-*

tion of tithes, and it was insisted against the parson, that this was a *citing him out of his diocese;* at first the Court held, That the *residency* of the party draws the cause to the diocese where *he lives*, in transitory matters, but not in *local;* as for instance, an executor must be sued for a legacy where the will was proved, and not where he lives: But afterwards this case was ruled to stand upon a single reason; for whatever the law might be in other instances, yet in the case of* *tithes*, the statute 32 *H.* 8. expressly enacts, that the party *subtracting* them shall appear before the ordinary of the diocese where they were subtracted, and therefore a consultation was granted in this case.

*2 Lev. 96.

COLOUR. See Pleas 6.

COMMITMENT.

1. ELDERTON'S *CASE*.

[Mich. 2 Annæ, 2 Ld. Raym. 978. S. C.]

**ELDERTON* was committed by the *Board of Green Cloth*, for executing a *fi. fa.* in *Whitehall*, and upon the return of a *habeas corpus* it was argued to be lawful, and not at all prejudicial to the privilege of the *palace*, and that they had no power to commit for breach of the peace, having a power only over the queen's family, for the government of the menial servants, and that the privilege of *Whitehall* was by the statute † 28 *H.* 8.

Mod. Cases 73. The queen's palace hath no privilege where she is totally absent. Postea, Privilege 11. S. C. Holt 590. S. C. † 28 H. 8. cap. 12.

Northey, attorney-general, on the other side argued, that there is a standing commission of the peace for the *verge and palace*, and that the officers of the *Green Cloth* are always commissioners; and that the statute 28 *H.* 8. did not create the privileges of a *palace*, but only ascertained the boundaries thereof, for the queen may declare any house to be her palace without the parliament; and such declaration being made under the great seal, it after-

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wards continues a palace, though the queen doth not reside there.

Powell, Just. The privilege of the *palace* is by *common law*, and that in respect of the king's presence: Breaking the Exchequer hath been held to be burglary, though none of the king's money was there; and one *Jones* had his hand cut off for a murder committed by him in the Tower, and was afterwards executed.

Holt, Ch. Just. doubted the case of burglary in breaking the *Exchequer*, *&c.*, and denied *Jones's* case, because the same fact cannot be a misprision and a murder, for the one will extinguish the other; he said, that it was true, his hand was cut off, but it was without any manner of authority, for he had seen the * roll, and there was no judgment for it; he was of opinion, that where the *queen* was totally absent, and neither present by herself or by any of her domestics or family, the place hath no privilege; but it is otherwise where it was only a personal absence for a little time: The queen at this time was at *Windsor;* now whilst she was there, suppose a murder had been committed in *Whitehall*, shall the fact be tried before the *Lord Steward?* and he held that it should not.

* Mich. 15 & 16 Eliz. Rot. 2. Burdet v. Muskett

2. CLERKE'S *CASE*.

[S. C. 1 Salk. 349.]

5 Mod. 64. 156. Custom returned for the mayor, &c. to commit to the sheriff, and it did not appear that the person to whom he was committed was sheriff.

† 1 Vent. 115.

THE return of a *habeas corpus* was, That there was a custom in *London*, that if a man chosen of the livery of any company should refuse to take upon him the office, that the mayor and aldermen might commit such person † until he should *declare* that he would take upon him the office, and that *Clerke* was chosen a *liveryman* of the company of *Vintners*, and refused to hold the office, and thereupon he was committed by a warrant in writing, *&c.* until he should *declare*, *&c.;* it was objected, that this return was ill, because it doth not set forth to whom he should declare his consent; besides, it was an insignificant custom, to commit until he should declare, because after such declaration he might still refuse to hold the office; they might impose a fine to be levied by distress, but they cannot commit; it is true, a custom to commit until he should take upon him the office of an *alderman* is good, because it is an office for administration of justice, but a *liveryman* is not such an office: Another objection against the return was, that the warrant of commitment should have been returned in *hæc verba:* But *per Curiam*, this commitment being by a *court of record*, the warrant need not be returned in *hæc verba*, as it ought if it had been extrajudicial commitment: But the chief objection

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was, that there was a custom returned for the mayor and aldermen to commit to the *sheriffs* of *London*, *&c.* or any other officer; and the return was, that he was committed *custodiæ meæ*, without saying he was sheriff of *London*, or any other officer attending the court; and for this reason it was adjudged insufficient.

3. THE KING *v.* WRIGHT.

THE justices of peace committed *T. S.* for a forcible entry, and *G. H.* was indicted for suffering him to escape; upon not guilty pleaded, the defendant was found guilty, and afterwards he brought a writ of error, for that it did not set forth how this commitment was made, (*viz.*) whether upon view of the force by the justices, or upon an indictment found; neither is it set forth, that *debito modo commissus fuit: Sed per Curiam*, It is only an *inducement* to the offence laid in the indictment; besides, after a verdict it shall be intended that the commitment was legal.

1 Vent. 169. Indictment for suffering a man committed for a forcible entry to escape.

COMMON.

1. HE who hath *common appendant* or *appurtenant* can keep but a number of cattle proportionable to his land, for he can *common* with no more than the land to which his common belongeth is able to maintain.

Jones 282, 286

2. One cannot prescribe to have sole *common of pasture*, excluding the lord, but a man may prescribe to have *solam pasturam omni anno omni tempore anni*, for this is not *common* but pasture, and the *lord* is not excluded from the whole profits, for he has the *trees & mines*.

2 Lev. 2.

3. And such a *prescription* is good, without alleging *levancy and couchancy*, but it is otherwise in case of common, for that ought to be of such cattle as are *levant and couchant* upon this tenement, because the *levancy*, *&c.* is the measure of the profit in the common.

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4. One who hath *solam pasturam* may license another to put in his cattle.

5. And so may one who hath common in gross for a certain number, because such a common is neither appendant, nor a common in gross *sans nombre*.

6. So where a man hath *solam pasturam*, he may license another *pro hac vice* to depasture his cattle, but not for any time certain, for that would amount to a lease of a thing (which lies in grant) and without deed.

2 Lev. 73.

7. A *common appurtenant* to a messuage and lands may be aliened, if it is for a *certain number* of beasts, otherwise where it is a *common appurtenant* for all beasts *levant and couchant* on the land.

2 Lutw. 1240.

8. One commoner cannot distrain the beasts of another commoner depasturing in the common, but he may the beasts of a stranger, because he had no pretence of any right.

9. WOOLSTON *v.* SLATER.

3 Lev. 104. Commoner cannot distrain the beast of a stranger, without shewing how he is damnified in his common.

IN replevin, the defendant avowed for damage-feasant on his common; and upon a demurrer to this avowry it was adjudged not good, because he did not shew some particular damage to himself, or that he could not have his common *in tam amplo modo quo debuit & consuevit;* for a commoner cannot justify to distrain the beast of a stranger, without shewing how he is damnified in his common.

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CONDITION.

Vide 1 Salk. 171. Dougl. 684. 3d. edit. Jones 182. Saund. 66.

1. THE *condition* of a bond is always to be taken and construed in favour of the obligor, because it is the words and concession of the obligee; and wherever any sense can be collected out of the words, it shall never be construed to be insensible, because it is to save a forfeiture.

2. Where a man is bound in a bond with a condition not *to trade*, both bond and condition are void; but if he was bound not to *trade in a particular* place, it is good.

Condition precedent.

3. These diversities were taken by *Holt*, Ch. Just. *ss.* Where in *executory contracts* the agreement is, that one shall do such an act, and for the doing thereof the other shall pay so much money; there the doing the act is a *condition precedent* to the payment of the money, and the party shall not be compelled to pay till the act is done.

1 Vent. 177. 214.

4. Where a day is appointed for the payment of money, which day happens before the thing contracted for can be performed, there an action may be brought for the money before the thing is done, because here it appears, that the party relied upon this remedy, and never intended to make the performance of the thing a *condition precedent*.

1 Vent. 147. 1 Saund. 319.

5. Where a *certain day of payment* is appointed, which is to enure at a time subsequent to the performance of the act, which by the contract the party had agreed to do, there *performance must be averred*, and so is *Jones* 218. to be understood; and some other books contrary to this are not law; for every man's bargain ought to be performed as he intended it; and where a man relies upon his remedy, it is but just that he should stand to his agreement; so, on the contrary, there is no reason he should be compelled to trust when he did not intend it.

Dyer 76. contra.

6. And therefore where two agree, that one shall have his horse, and the other shall pay so much money; no action lies for the money till the horse is delivered.

7. PAGE *v.* HEYWARD. [96]

[Trin. 3 Annæ.]

ADJUDGED, That where he who is to perform a condition is only in nature of a *trustee* or instrument, there a temporary disability is absolute and for ever; but, where the performance is for his own advantage, it is otherwise, for the disability may be removed, and then he may perform the condition.

Where he who is to perform a condition may be disabled, where not.

CONSIDERATION.

1. THE defendant promised, that in consideration the plaintiff would pay the money due to him on bond on such a day, that he would deliver up the bond; adjudged a good consideration, because now he might have the money without putting the bond in suit.

Hutt. 77. Cro. Eliz. 194.

2. A surety having paid the debt of his principal, who was dead, told his executor that he had paid the money,

Sid. 89.

who thereupon promised to repay him, if he would *forbear* till such a day; adjudged a good consideration, for the executor was liable in equity, though not at law without a promise.

Vide 3 Bur. 1671.

3. A promise upon a consideration executed or past, unless it is grounded upon a precedent request, is not good, but where it was made upon request, the subsequent promise relating to it shall prevail; as for instance, if a promise is made at the time of the request, for there the consideration is meritorious: thus a promise to pay 10*l.* for that *W. R.* was bail for my servant, is not good; but a promise to pay 10*l.* for that he was bail at my request for him, is good (*a*).

Comyns, Action on Assumpsit, B. 12. 1 vol. 3d ed. 201.

4. A promise grounded on a *consideration executory*, or which continues, is good, though the consideration was without request; as for instance, for that you married my daughter, I promise to give you 100*l.* good, or for that I owe you 20*l.* lent to me, I promise to pay you on such a day, this is good, for the debt continuing, the consideration must continue.

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5. But where the plaintiff declared, that in consideration he would discharge the defendant from 22*l.* due from him to *W. R.* his master, he (the defendant) promised to lay out 40*l.* in repairing the plaintiff's barge; this was held void, and the consideration illegal, for the plaintiff cannot discharge a debt due to his master.

(*a*) If, in consideration of a thing already done without my request, not for my benefit, and where I was under no moral obligation to do it, I promise to pay the money, the promise is *nudum pactum* and void. But if I were under a moral obligation to do a thing, and another does it without my request, and I afterwards promise to pay, that is good. *Bull. N. P.* 147.

6. THORNBURGH *v.* WHITACRE.

[S. C. 1 Ld. Raym. 1164.]

Mod. Cases, 305. 1 Lev. 111. S. P. Consideration, though not good, yet the jury may give reasonable damages.

ASSUMPSIT in consideration of half-a-crown by him given to the defendant, he promised to give him (the plaintiff) *two grains of rye* on *Monday* following, and so on every *Monday* double, by progression, for one year: The defendant pleaded *non assumpsit*, and upon a motion to stay the trial, it was denied; for *per Curiam*, though it amounts to a great quantity, yet the jury will consider the folly of the defendant, and give reasonable damages (*b*).

(*b*) *Vide* 1 *Ventr.* 65, 267.

CONSPIRACY.

1 Vent. Thodie's case. 1 Wilson 210.

1. WHEN conspiracy is the *gist* of the action, if one be acquitted, the other cannot be found guilty; but where the *gist* of the action is upon another matter, and the *conspiracy* is only laid by way of *aggravation*, if one be acquitted, the other may be found guilty: But in both cases, if one be found guilty, and the other dies or doth not come in, judgment may be given against him who was found guilty.

2. Where a man is *falsely and maliciously* indicted of any crime, which may prejudice his fame or reputation, he may have an action for the conspiracy.

3. And so he may, though the offence for which he was indicted doth not import slander, but endanger his liberty, (*i. e.*) where it is such for which he may be imprisoned.

4. And so he may, if the indictment is only injurious to his property, in putting him to a needless expense in defending himself.

F. N. B. 116. 1 Wilson 210.

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* 5. And in these *actions*, it is not the conspiracy but the *damages*, which are the ground of them; and therefore *per Holt*, Ch. Just. one may be acquitted and the other found guilty, which cannot be in a writ of conspiracy.

6. Where there is a malicious indictment in prejudice of the fame and reputation of another, though the indictment is erroneous, or an *ignoramus* is found, yet an action will lie, for the mischief arises by the slander; but it is otherwise where the indictment is for a trespass, or for a riot, because in such cases the defendant is indicted in respect of an injury to his purse, which cannot be where it is erroneous, or an *ignoramus* found.

7. Action on the case for causing and maliciously procuring him to be indicted for a riot, by reason whereof he was put to great charge in defending it, good, for he was damnified in his property, and that out of malice; but in such case the plaintiff must prove *express malice* in the defendant, and not only that he (the plaintiff) was innocent.

Nota, Most of these points were adjudged in the case of *Savill and Roberts*. *Quod vid.* 1 *Salk.* 14.

CONSTABLE.

1. CHARLEY PARISH'S *CASE*.

[9 Will. 3. B. R. 1 Salk. 175. S. C.]

Where a constable may execute a warrant out of his parish, where parish.

THE village of *Charley* having no *constable*, the justices by order of sessions appointed one: But *per Holt*, C. J. where there is no *leet* the constable ought to be chosen in the *town* out of which the *leet* was derived; it is true, the justices have exercised this power, and rather than to deprive them of it, this Court will *intend*, they have sufficient authority by some act of parliament, and therefore if a *town* be erected they may nominate and appoint a constable; but *Charley* having no constable, it is no *vill* but a *hamlet*, for a *vill* and a *constable* are *reciprocal:* And, as to the authority of a *constable* out of his parish, he held, that if a warrant is directed to a constable by name, he may execute it at any place in the county, though he is not compellable to do it out of his parish: But if it is directed to all constables generally, in such case it is to be taken respectively, and no constable can execute it out of his parish.

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2. When the *county* was first divided into *hundreds*, a *constable*, or *conservator pacis*, was appointed in every *hundred*, and this was in aid of the sheriff, who was the general *conservator pacis* through the whole county; and so also in assistance of the constables who had the *whole hundred*, *petty constables* came at last to be appointed in every town.

3. At first both the *constable* and *petty constable* were appointed by the sheriff in his *tourn*, and there they were sworn, but now they are commonly appointed at the *court leet*, and, in default thereof by the *sessions*.

4. And as to his authority out of his parish: *Per Holt*, Ch. Just. If a warrant is directed to such a constable by his name, he may execute it in any place in the county, though he is not compellable so to do, or to do it out of his parish; but if the warrant is directed to all constables in general, then it is to be taken respectively, and in such case a constable cannot execute it out of his parish.

COPYHOLD.

1. FISHER v. NICHOLLS.

[Hill. 12 Will. 3. B. R.]

IN this case, *Holt*, Ch. Just. held, that copyhold estates are subject to the rules of law, and will not pass by such words in a conveyance as are improper to pass other estates, unless there is a custom for that purpose, for that may and often doth distinguish them; thus by custom in some manors * a grant to *A.*, *B.*, and *C.*, shall be construed as a gift to *A.* for life, remainder to *B.* for life, remainder to *C.* for life.

PosteaDevise 10. Copyhold estates are subject to the rules of law. Vide Idle v. Cook, 2 Salk. 621. Sutton v. Stone, 2 Atk. 101. Lovel v. Lovel, 3 Atk. 11.

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2. PAGE v. SMITH.

[Mich. 8 Will. 3.]

IN this case, *per Holt*, Chief Justice, whatever may pass by deed without *surrender*, though it may be necessary to enrol the deed, is no copyhold; likewise whatsoever may pass by surrender † *secundum consuetudinem manerii*, without saying, *ad voluntatem domini*, is no copyhold.

What is copyhold, and what not. Cumb. 397. S. C.

† 2 Lutw. 1171.

3. Adjudged, that where a copyhold is *forfeited*, the lord may grant it without a seisure, for the forfeiture is a determination of the will of the party, and the lord is in as of his reverson.

1 Lev. 26.

4. *A. dominus pro tempore habens titulum*, dispenses with the forfeiture by *admitting* a copyholder who hath forfeited, and that not only as to himself but also to him in reversion, for his grant and admittance amounts to an entry for the forfeiture and new grant.

Vide 3 Term Rep. 171, 471.

5. But an admittance by a lord who hath no title, but is a disseisor, cannot purge the forfeiture. *Ibid.*

6. A covenant to surrender copyhold-lands to *W. R.*, the covenantor surrendered to two copyholders out of court, to the use of *W. R.*; adjudged this is a good performance of the covenant, for this is a good surrender.

Hard. 293.

CORONER.

1 Lev. 120.

1. HE is chosen by the county, and therefore his office doth not determine by the *demise of the king*.

Poph. 209.
2 Lev. 141, 152.

2. He cannot take an *inquisition* but upon *view of the body*, therefore where one drowns himself, and the body cannot be found, the inquisition must be taken by commission or by justices of peace, or justices of assize may make

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inquisition without a commission, and such inquisitions are traversable, though an inquisition taken before a coroner is not as hath been sometimes held; but anciently it was traversable in all cases, but where it was *fugam fecit*, and so it is now.

2 Lev. 152

3. Therefore where a coroner's inquest found *W. R. felo de se*, his executors were admitted to *traverse* it, but the inquest was quashed for the omission of the word *murdravit*.

1 Ventris 273.

4. A coroner's inquest *super visum corporis*, found that *W. R. felonice seipsum in rivum misit & in rivo prædicto seipsum emergit, & sic seipsum murdravit*, this was quashed, for *emergo* is to rise out, and not to sink down in the water; and the going into the river is no felony, nor felonious, but it is the drowning that makes it felony; therefore the conclusion, *& sic seipsum murdravit*, without the premises, is naught; for it is not sufficient to find a man murdered himself, without shewing how.

1 Vent. 182.

5. A coroner's inquest may be set aside for a *misbehaviour* of him in his office, and a *melius inquirendum* by *B. R.*, as supreme coroner, or *B. R.* may issue out a commission, or justices of *oyer* and *terminer* may inquire, but there cannot be a *melius inquirendum* to the coroner.

1 Lev. 180.
2 Jones 53.

6. Upon an ejectment and trial for a murder, depositions taken before the coroner may be given in evidence, if the witnesses are dead.

3 H. 7. cap. 1.
1 & 2 Ph. & M. cap. 13.

7. He must write down the effect of the evidence given, and certify it to the justices of gaol-delivery, and bind over the witnesses to appear.

CORPORATION.

1. ANONYMOUS.

PER Holt, Ch. Just. A corporation is an *ens civile*, a *corpus politicum*, a *persona politica*, a *collegium*, an *universitas*, a *jus habendi & agendi*; some are constituted for public and others for private charities; the former are not subject to any founder, or particular statutes, but to the general laws and statutes of the realm, by which they are maintained and supported; but private charities are subject to the rules and ordinances of the founder, who by law is *visitor*, unless he appoint another.

What is a corporation. Vide Bl. Com. 467.

2. ANONYMOUS.

[Mich. 10 Will. 3. C. B.]

A CORPORATION, *per Treby*, Ch. Just. and *Powell*, Just. if by *prescription*, may have several names; but if by charter, it is otherwise, for in such case it cannot have several names at the same time and to the same purpose; for if a new charter is granted, and by a new name, the old one is gone; as in the case of baptism by one name, and confirmation by another, but such corporation may have several names to several purposes; for it may be created *per nomen D.* to take and to grant, and *per nomen F.* to sue and be sued.

Corporation by prescription may have several names, but if by charter it can have but one name. See Hardres 405, 504.

3. COLLEGE OF PHYSICIANS *v.* SALMON.

[Trin. 13 Will. 3. B. R. 1 Ld. Raym. 680. S. C.]

IN this case it was held by *Holt*, Ch. Just. that where my Lord *Coke* says, a corporation must have a *name*, it must be understood, either as expressed in the patent, or implied in the nature of the thing; as if the king should incorporate the inhabitants of *Dale*, and give them power to choose a *mayor;* in this case, though there is no name of incorporation in the patent, yet it would be a good incorporation, and the name would be mayor and commonalty; so the city of *Norwich* was incorporated by a grant of *H.* 4. by the name of mayor and sheriffs, and they are called, mayor, sheriffs, and commonalty.

5 Mod. 327. 2 Salk. 451. S. C. Corporation must have a name, either express or implied, in the patent. 1 Salk. 191.

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4. THE MAYOR OF THETFORD'S *CASE.*

[Hill. 1 Annæ.]

1 Salk. 192. Where a corporation may do an act on record, without their common seal.

A *MANDAMUS* being returned without the *common seal*, and without the hand of the *mayor;* and it being moved, that though it was returned in the name of the corporation, yet it was no corporate act to charge the corporation, without their *common seal*, nor the *mayor* without his hand, and therefore one or both ought to be done; whereupon the Court ordered precedents to be searched, and it appeared that there were many without the *common seal*, and without the *mayor subscribing* his name; and it was held by *Holt*, Ch. Just. to whom the Court agreed, that a corporation may do an act on record without their *common* seal; that this is the case of the *city of London* every year, who make an *attorney* yearly in this court by *warrant of attorney*, without *sealing or signing it*, and the reason is, because they are estopped by the record to say, that it is not their act; and therefore, if an action should be brought against the corporation for a false return, they are estopped to say, that it is not their return, for it is *responsio majoris*, *&c.* upon record; and as to the hand of the mayor, it is a sufficient evidence to charge him, that the *mandamus* was delivered to him, and that it hath his return, and it is incumbent upon him to shew the contrary; for the mayor or any other magistrate of the corporation, who caused or procured the return, are chargeable in their private capacities, if it is false.



5. NEWTON *v.* TRAVERS.

[Mich. 8 Will. 3.]

How a dean and chapter may lease. 1 Leon. 307. 1 Inst. 3. a. contra. 2 Inst. 666.

ADJUDGED, that a *dean and chapter*, or a *warden and fellows of a college*, may grant or lease by the name of *dean and chapter*, *&c.* and without shewing their proper names; and so they may plead or be impleaded, because in their corporate capacity they have no name of baptism, or any other name than that by which they are incorporated; but it is otherwise in the case of a parson and vicar, for they must use their name of baptism.

6. ANONYMOUS.

[Pasch. 13 Will. 3.]

AN action was brought against the *East-India Company*, who are a corporation, and the action was for 5000 *l.* and several *distringas*'s served, but they did not appear; whereupon the Court was moved, that they might have exemplary issues returned, and a rule was made that the sheriff should return good issues, otherwise to bring an action against him for not doing it; but at last he was ordered to attend.

Corporation not appearing to an action.

7. *An information* was exhibited against the *bailiffs and burgesses of Yarmouth*, one of the bailiffs (there being two) appointed an attorney to appear, but the other would not consent, and the Court was moved, that their liberties might be seised for want of an appearance: But the better opinion was, that upon an *information* in nature of a *quo warranto*, which is *datum est Curiæ intelligi*, and which is in nature of a personal action, there cannot be a seisure before a summons (*i. e.*) the liberties cannot be seised upon a *venire facias*, but upon a *distringas*; but it is otherwise in a *quo warranto*, for there it is *summonitus fuit*; then it was made a question, Whether a warrant of attorney made by one of the bailiffs was not sufficient? because the corporation did not disavow it, but that was not determined.

Corporation not appearing, there cannot be a seisure without a summons.

COSTS.

1. THE KING *v.* SUMMERS.

[Pasch. 1 Annæ. 1 Salk. 53. S. C.]

THE defendant was indicted for a *trespass*, and also for a riot; and upon not guilty pleaded, it was removed into *B. R.* by *certiorari*, and the defendant went before the master, who taxed costs; and the Court was moved, that he might go before the master again, that the prosecutor might be considered in the costs for his charges *below*, the master

Costs taxed after the certiorari, without considering the costs below.

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having only taxed costs in respect to the charges since the *certiorari;* and *per Curiam,* the master ought not to consider the charges below, but only upon the *certiorari;* then it was moved to aggravate the fine, but that was denied, since the party had been before the master, and if he insisted on it, the Court would set aside the costs already taxed.

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2. BIGLAND *v.* ROBINSON.

[Hill. 8 Will. 3. B. R.]

Executors pay no costs. Vide 1 Salk. 207, 314. Str. 682. Vent. 92.

ADJUDGED, that where *executors* sue upon any *contract of their testator,* or for any wrong done to him, they shall pay no costs either upon a nonsuit or verdict against them; so wherever he must sue as executor, as for instance, he brought an action of debt upon a bond due to his testator, the defendant pleaded payment of the money to himself, (*viz.*) to the executor, upon which they were at issue, and a verdict against the plaintiff, yet he paid no costs; but if he had brought the money into court (*a*) then the plaintiff must proceed at his peril.

(*a*) *Vide contra Bunb.* 44.

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3. JENKINS & *UX'* *v.* PLOMBE.

[Hill. 2 Annæ. B. R.]

Mod. Cases 91, 181. 1 Salk. 206. When husband and wife must join in the action.

DEBT by husband and wife as executors of *W. R.* in which they declared, that the defendant was indebted to them *as executors* for so much money *received by the defendant for them as executors;* upon *non assumpsit* pleaded, the cause came to be tried, and the plaintiffs were nonsuited; and in this case several points were resolved by *Holt,* Ch. Just. to which the Court agreed.

Vide 1 Salk. 282.

1. Where a man *marries* a woman, who is an *executrix,* and if *before the marriage* a stranger receives money due to the testator, and he is sued for it, the *husband and wife must join* in the action; but where the money is received after the *marriage,* the husband may sue alone.

2. If the money was received *after the marriage,* and by order or consent of the husband, it is the same thing as if the husband had received it himself; it became *assets* in his hands, and the original debtor of the testator is discharged; and if it is paid by his order or appointment to a third person, it is a *devastavit* in the executors, because the original debt to the testator is paid off, and here is a new debtor to the executor, who owed nothing to the testator.

3. In the principal case, if the defendant had received this money, without the order or consent of the husband, in such case he, by bringing this action, had affirmed the receipt, and that it was his election, and that he consented to make the defendant his debtor, so that the original debtor to the testator was thereby discharged.

4. That though the very bringing an action against the defendant shews, that the plaintiffs consented to make him their debtor, *& omnis ratihabitio retrotrahitur, &c.* so as the plaintiffs might bring this action in their own name, yet the bare bringing the action did not make it assets in their hands till judgment was obtained; and therefore, if the plaintiffs fail in their action (as they did in this case, being nonsuit,) the matter is set at large again, and the plaintiff may sue the original debtor of the testator, if he will.

Where an executor shall pay costs, where not.

5. That executors are not excused from paying *costs* by the letter of the *statute*, but by a very favourable construction thereof; as being presumed to have no knowledge of the affairs of their testator, and therefore an executor shall pay *costs* for not going on to trial; and where a cause of action arises to the executor himself, for the which he may sue without naming himself executor, he shall pay *costs;* and though he names himself executor, and sues as such, yet if the case was so that he might have sued without naming himself executor, he shall pay *costs;* and that in the principal case he might have sued without naming himself executor, because the action was brought *for so much money received by the defendant to his* (the plaintiff's) *use, and by his order*, and therefore shall pay costs. And *per Curiam*, an executor may bring trover, *as executor*, for a *conversion* in the time of his testator, and *shall not pay costs*, but it is otherwise if the conversion was in his own time; so where a judgment is obtained by the testator, and the defendant escapes in the time of the executor, for which he brings an action and is nonsuit, he *shall not pay costs;* but it is otherwise if the judgment and escape were both in his own time.

If *W. R.* is indebted to the testator, and the executor accompts with him, he (the executor) may bring an *insimul computasset;* and this is a *new action*, which the testator himself could not have brought, yet the plaintiff shall not pay *costs* because the old debt remains, for it is not extinguished by the accompt, but made certain, so that it is not a *new cause of action*, but where an executor brought trover and conversion, and the defendant came to an agreement with him to pay so much for the conversion, in such case the plaintiff *shall pay costs*, because by this agreement the original cause of action is extinguished.

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6. *The Ch. Just.* held, that where a plaintiff sues as executor, and could not sue but as such, the thing for which the suit is brought is not *assets* till execution sued forth; but where he need not sue as executor, it is not assets till judgment, and then it is, for the original debtor is then discharged, so that it is a *devastavit:* This case is reported in 1 *Salk.* 207., but not so full and so clear as here, and in the argument these cases were cited, *Latch.* 220. *Hutt.* 78, 79, 214, 220. 3 *Lev.* 60, 375. 2 *Lev.* 185. 1 *Vent.* 109, 119. *Jones* 170. *Hob.* 219, 233, 284. 1 *Cro.* 29, 36, 175, 229.

7. ANONYMOUS.

[Hill. 9 Will. 3.]

Vide 2 Salk. 506.

A MOTION was made, that a *pauper* might pay *costs* for not going on to a trial: *Sed per Curiam*, he pays *no costs* unless upon a *nonsuit*, or where the verdict is found against him, and then he shall pay costs, or be whipped. See stat. 23 *H.* 8. *cap.* 15.

COVENANT.

1 Lev. 114, 183. Pitt v. Russel.

1. IN *covenant*, the plaintiff assigned several breaches in *not repairing;* the defendant pleaded *non infregit conventiones*, and upon demurrer to this plea it was adjudged ill, because *not repairing*, and *non infregit conventiones* are two negatives, upon which the issue cannot be joined, but it is good after a verdict, for the *issue is not immaterial* but *informal* only.

1 Lev. 301. Sid. 466. 2 Saund. 177.

2. Covenant and declares, that *W. R.* and his wife levied a fine of lands *sur concessit*, to the plaintiff *with warranty: Per Curiam*, an action of covenant will lie upon this warranty as well as voucher or *warrantia chartæ*.

1 Lev. 78.

3. *Covenant* for non-payment of rent, and assigned the breach, that the lessee did not pay the rent at any

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of the feast-days on which it ought to be paid during the

term; this declaration was held good, though general, for it may be true, that no rent was paid on any of the said days.

4. The plaintiff conveyed an office to the defendant *provided*, that out of the first profits he pay the plaintiff 500*l.*; adjudged, that an action of covenant lies on this *proviso*, for it is not by way of condition or defeasance, but in nature of a covenant to pay the money.

1 Lev. 155.

5. *Covenant* to pay *W. R.* 100*l.*, he making him an estate in *D.*; adjudged, that if he tender him a feoffment, and offer to make *livery and seisin*, &c. he may bring an action for the money as if he had actually made a title.

1 Vent. 148. Vide Dougl. 684. 3d edit.

6. Lessee for forty years made an under-lease to *W. R.* for five years, and afterwards made a lease to *L. L.* for forty years, who covenants to repair *durante termino præd.* 40 *annorum*, the under-lessee refused to *attorn*, yet *L. L.* the lessee for forty years must repair, because his lease is commenced in point of computation.

1 Vent. 185.

7. Debt upon a bond of covenants, and for breach, assigned, that the defendant had broke the covenants; upon a demurrer to this declaration, it was held to be ill, because it is double; for he ought to have insisted upon one breach certain.

1 Vent. 126. Vide stat. 8 & 9 W. 3. c. 10.

8. COPLEY *v.* HEPWORTH.

[Trin. 3 Jac. Rot. 261. B. R.]

What are mutual covenants.

IN an action of *covenant* upon *articles of agreement*, &c. wherein the plaintiff covenanted with the defendant *facere dimissionem*, to him of a *mill*, paying 20*l.* rent *per annum* for so many years, and the defendant covenanted to pay the rent during the term; the plaintiff brought this action for *non-payment of rent*, in which he set forth, that the defendant *entered and enjoyed* the mill, &c. The defendant pleaded, that the plaintiff did not make *any lease* to him; and upon demurrer to this plea it was adjudged, that these articles did not amount to a * lease, being only a covenant *facere dimissionem* (*a*); and *Holt*, Ch. Just. held, that the making the lease was a *matter precedent*, and that the plaintiff could not be entitled to the rent till a lease was made; but *Eyres*, *Dolben*, and *Gregory*, justices, *contra*, because these are *mutual covenants*, and equal

* Roll. Ab. 848. 2 Cro. 172.

(*a*) *R. ac.* 5 *Term Rep.* 163. *Roe* v. *Ashburner*: That where the agreement refers to a future act of demise, it shall not have the operation of a demise itself; but where it is intended by the parties to be the instrument under which the lands are held, it shall have that operation.

remedies are on both sides (*a*), and it is alleged that the defendant entered, but upon the other point the defendant had judgment upon arguing the demurrer, *Mich.* 2 *W.* 3.

(*a*) *Vide Thorpe* v. *Thorpe*, 1 *Salk.* 171., and notes thereto.

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9. HANNAM *v.* REDMAN.

[Mich. 9 Will. 3. B. R.]

Covenant to save the lessee harmless from a rent-charge; if he pay it without compulsion, he pays it in his own wrong.

PER Holt, Ch. Just. Where several lands are charged with a rent-charge, and the owner of these lands makes a lease thereof, and covenants with the lessee to *save him harmless*, *&c.* and afterwards the lessee pays the rent to the grantee of the rent-charge, *voluntarily and without compulsion*, in such case he pays it in his own wrong, and must pay it again to the lessor; but if he is distrained for the rent-charge and his goods taken, this is a breach of the covenant, and not before; and the lessee must not allege generally, that he was compelled to pay the rent, but must shew how.

1 Vent. 56.

10. A bishop made a lease, in which the lessee covenanted to *repair;* the bishop died, and his executors brought an action for not repairing in the time of the bishop, and adjudged well.

COVENANT TO STAND SEISED.

See Uses.

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COUNTY PALATINE.

1. COTTON *v.* JOHNSON.

[Hill. 2 Will. 3. B. R.]

1 Salk. 183. S. C. In ejectment for lands in Ely, a venire fa-

IN *ejectment* for lands in the isle of *Ely*, after not guilty pleaded, it was suggested on the roll, the privilege of the *county palatine*, that no jury should be returned out

of the *isle*, and so a *venire facias* was prayed to *R.* the next vill in the county of *Cambridge*, *et quia videtur justiciariis hic rationi consonans ei conceditur;* it was objected, that the defendant's confession should have been entered likewise on the roll, (*viz.*) *et quia defendens hoc non dedicit ideo ei conceditur*, but adjudged, though some precedents are so, yet either way is well enough; for if the fact is otherwise, he may bring a writ of error, and assign it for error; then it was objected, that the entry ought to have been, *quod liberi tenentes nec residentes in eadem insula non aggredi debent ad aliquam juratam extra libertatem illam faciend';* for otherwise it doth not appear to be a privilege annexed to the inhabitants, but a mere cognizance in the *bishop;* however, the trial being in the county of *Cambridge*, of which this is parcel, the Court held it to be aided by the statute 16 & 17 *Car.* 2. *cap.* 8.

cias was prayed to the next vill.

2. Though it is commonly said, that *Lancaster* is a county palatine by act of parliament, and *Chester* and *Durham* by *prescription*, yet this must not be intended of a mere prescription, because a franchise, *quæ se exaltat in prærogativum regis*, can never be gained by mere prescription, but must depend on ancient grants of kings, and allowances in *eyre* as well as by prescription.

§ 1 Vent. 157. Davis 61. b.

3. It is true, *Lancaster* was erected into a *county palatine, in pleno parliamento, anno* 50 *Ed.* 3. and it was granted by the king to his son *John* for life, that it should have *jura regalia*, and a king-like power to pardon *treasons, outlawries*, to make justices of peace and justices of assize, and all processes and indictments were in his name; but these royalties are abridged by the statute 27 *H.* 8. *cap.* 24.

4 inst. 204. 2 Lut. 1235.

*4. But because *Lancaster* was erected by *act of parliament* into a *county palatine*, therefore outlawry in *Lancaster* is pleadable in the courts of *Westminster*, but outlawry in *Chester* is not.

Plowd. 215 b. [* 111]

5. By the charter of *H.* 4. confirmed by parliament, the possessions of the duchy of *Lancaster* are kept separate from the crown, and are to be in the king as they were before he was king, so as to pass by livery or grant.

Plow. 215. 2 Inst. 205.

6. There is a *seal* for the *county palatine*, and another for the *duchy*, (*i. e.*) such lands as lay out of the *county palatine*, and yet are part of the *duchy;* for such there are, and the *dukes of Lancaster* held them, but not as *counts palatine*, for they had not *jura regalia* over them (*a*).

2 Lutw. 1236

7. It is for this reason, that the king may make a corporation by the *seal of the county palatine*, within the *county palatine*, for so might the *count palatine* himself, as having *jura regalia*.

(*a*) According to the Editor's observation, many patents have both seals, particularly those which appoint to offices within the county palatine.

8. But the king cannot grant or make a corporation by the *duchy seal* within the *duchy lands*, because it is *jus regale* to grant a corporation, and the *Duke of Lancaster qua talis* could not do it.

9. Any thing natural, and which arises from the land, and which might be granted, the king may grant under the *duchy seal*, for those things might be granted by the *Duke of Lancaster*, as he was a subject; of this nature are *advowsons*, *rents*, *ways*, *offices*, *&c.* for these savour of the land, and might have been granted by the *duke* before the possessions came to the crown; but it is not so of a *fair* or *market*, for those are *jura regalia*.

2 Lev. 24.

10. Prohibition was prayed to the *duchy court at Westminster*, for holding plea of lands within the *county palatine*, when there is a *court in the duchy* for that purpose, and the *duchy at Westminster* is only for lands out of the *county palatine*. *Et per Curiam*, It doth not appear that they have any legal authority to act as a court of equity, for the statute of *Ed.* 4. doth not give them a court of equity, but a court of revenue; however, it was allowed, because of long continuance and practice.

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CUSTOM.

See that most excellent Report of the Case of Tanistry, in Sir John Davy's Reports, wherein this subject is treated with great learning and perspicuity. Fol. 28. b. See also 1 *Bl. Com.* 74. 2 *Roll.* 264. *Comyns, Prescription*, vol. 6. 3d. ed. pa. 78.

1. AS no law can oblige a people without their consent, so wherever they consent, and use a certain rule or method as a law, such rule, *&c.* gives it the power of a law.

2. Now this *consent* is either *verbis* or *factis*; (*i. e.*) it is expressed by *writing*, or implied by deeds and actions; and where a law is founded on an implied assent, *rebus & factis*, it is either common law or custom.

3. If it is *universal*, then it is *common law*, if *particular* to this or that place, then it is *custom*, and had its rise in this manner:

4. *ss.* When the people found any act or rule to be fit and agreeable in its first instance, it was natural for them to repeat and practise that rule; and if this continued from age to age, and was so practised, then it grew into a law either local or national, according to the extent of it.

5. And such custom ought to have four properties, (1.) It ought to have a reasonable commencement, for no usage can make that good which was not so *ab initio*.

6. But a custom shall not be taken to be unreasonable because it is contrary to the *common law;* for the customs of *gavelkind* and *borough-english* are contrary to the common law, and yet they are allowed to be good.

7. Neither is a custom unreasonable for being injurious to private persons or interests, so as it tends to the public and general advantage of the people; therefore a custom to undermine houses *in publico incendio*, a custom to turn his plough on the headland of another, are good; the one to prevent the spreading of the fire, and the other in favour of husbandry.

8. But where a *custom* is injurious to the public, or to a great number of people, and only for the benefit of some individual, in such cases it is unreasonable; as for instance, a custom that the commoners of such a manor shall not put in their cattle till the lord first puts in his beasts, [113] or that the lord shall distrain and keep the distress taken till a fine or ransom is paid at his pleasure; for the original of such customs was by tort or usurpation.

(2.) A custom ought to be certain.

(3.) The continuance to be without interruption; for discontinuance destroys a custom by the same reason that continuance made it.

(4.) A custom must not be against the prerogative of the king.

9. Now as to *local customs*, it hath been held, that a custom of a manor cannot extend beyond that manor; therefore in trespass for breaking his close in *D.*, the defendant pleaded a custom within that manor for every tenant to have a way in the place where, *&c.* and it did not appear, that the *locus in quo*, *&c.* was within the manor, this was held naught upon a demurrer. Sid. 237.

10. Trespass for breaking his close; the defendant pleaded, that the close lay in the hundred of *W.* in the said county, called the *Kingsfield;* and that in the said place called the *Kingsfield*, there is, *&c. et talis consuetudo usitat' in eodem quod bene alicui* (omitting the word *licuit*) *volenti fodere pro plumbo. Et per Curiam*, want of the word *licuit* makes all imperfect; but if it had been in, yet this plea is naught, because he ought to have laid a *positive* 2 Lutw. 1317.

usage in fact, and not *quod bene licuit alicui, &c.*; besides, the *custom* is not laid in any *manor, vill*, or *parish*, and there cannot be a custom in a particular parcel of ground called the *Kingsfield*.

Moor 123. 3 Cro. 110, 392. 1 Lev. 262.

2 Lutw. 1188.

11. To plead *pro eo quod secundum consuetudinem*, a thing is so and so, is naught; for it ought to be positively alleged, *viz. quod infra* such a place, *talis habetur consuetudo*.

Moor 35. Cro. Eliz. 203.

12. *Custom*, that the parson, in consideration of the greater increase of tithes, shall keep a *bull and a boar*; this is good, because founded on a consideration of some benefit.

Roll. Abr. 559.

13. But a *custom in London*, that if a stranger die in one parish and is buried in another, that he shall pay the same fees in the parish where he died, that he doth to the parish where he is buried, is naught, because he was not bound to come to church, and to receive the sacrament in that parish where *buried*.

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DAMAGES. *See* Judgments 13.

1. WHERE a judgment is given for the plaintiff, and the defendant brings a writ of error, and the first judgment is affirmed, the defendant in error shall have damages and costs for the delay of execution, and the trouble he is put to, and this by the statute 3 *H.* 7. *cap.* 10.; but it is otherwise if the first judgment was given for the defendant, and the plaintiff brings a writ of error, for there is no delay in the execution; but this is now altered by the statute 8 & 9 *Will.* 3. *cap.* 11., by which it is enacted, that it shall extend only to judgments upon *verdicts*.

1 Cro. 560. 1 Vent. 133. 3 Lev. 374.

2. In all actions where the plaintiff hath *damages* by the common law, he hath *costs* likewise by the common law (*a*); and so it is in all actions wherein the plaintiff hath damages by virtue of the statute of *Ed.* 6. or any precedent statute, for in all such actions the statute gives him costs as well as damages.

(*a*) This is evidently incorrect, it being universally admitted that there were no costs at common law. Therefore the words "by the common law" should be rejected.

3. And in any of these cases, if a subsequent statute *doubles or trebles the damages*, the *costs* are so too; as for instance, in trespass for a forcible entry upon the statute 8 *H.* 6., or in an action of the case upon the stat. 2 *H.* 4. for suing in the *Admiralty* for a matter arising on the land, or in an action of *waste*, upon the *statute of Gloucester*, against tenant in dower, or tenant by curtesy, for these are acts of additions, (*i. e.*) there were damages at *common law* in these cases, which these statutes increase. 2 Inst. 289.

4. But in an action of *waste* against tenant for life, or in a *quare impedit*, the *plaintiff* shall have *damages*, but no *costs*, because there were no damages at common law, but are given after the stat. 1 *Ed.* 6. by subsequent statutes. Skin. 25.

5. Now in these statutes of creation, (*i. e.*) such statutes which give *damages*, where there were none before at common law, or before the *first of Ed.* 6., there is a diversity, where a statute gives certain damages, and where uncertain; for if a statute of creation gives *uncertain damages*, no *costs* shall be recovered as well as damages; but this is only to be intended of private actions to the party grieved, and not of popular actions, as in *qui tam*, *informations*, *&c.* Vide 1 Term Rep. 72. 3 Bur. 1733. Cowp. 367. 2 Inst. 289.

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6. COOKE *v.* BEALE.

[1 Ld. Raym. 176. S. C.]

ADJUDGED between these parties in an action of assault, *&c.* that where the plaintiff declares of a wounding by the word *maihemavit*, it is clear the damages may be increased, though damages are given by the jury. Where the damages may be increased, where not. Vide Latch. 223. 1 Wils. 5. 1 Sid. 108. 1 Barnes 106. Style 245.

7. So it is where the plaintiff sets forth a wound so particular in his declaration, that by the *description* it appears to be a *maihem;* and so it is where the wound is visible and apparent; and this may be done, whether damages are given by the jury upon an issue joined, or upon a writ of inquiry.

8. But this *increase of damages* must be given by the courts at *Westminster* upon the *view of the wounding*, or upon *affidavits* made thereof; and it cannot be done by the justices of *nisi prius*, who, if the wound is very great, must indorse the evidence on the *postea*, and upon such evidence the damages will be increased, though the wound was not set forth in the word *maihemavit* in the declaration: And so it is without such *indorsement* where the cause was tried before a judge of that court where the motion is made for increase of damages. Dyer 105, 228

2 Lev. 124.
4 Mod. 379.

9. Trespass in the *Palace Court*, the cause was removed into *B. R.* by the defendant, and the jury having given 15*s.* damages, the question was upon the statute 22 & 23 *Car.* 2. *cap.* 9. Whether the plaintiff should have no more cost than damages? *Et per Curiam*, the cause being removed by the defendant, the plaintiff shall have more costs, but not if it had been removed by the plaintiff, for so he might be more vexatious.

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DEATH OF EITHER PARTY.

See Scire Facias 2.

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2 Ld. Raym 766.

1. OADES *v.* WOODWARD.

[Hill. 1 Annæ. B. R.]

1 Salk. 87. S. C. Where a judgment was entered after the party died.

THE case was, one *Woodward* gave a warrant of attorney to confess a judgment, and died in *Hilary vacation*, the attorney entered judgment as of *Hilary term*, but did not bring in the roll till *after the essoin-day of Easter term*, so that now it was a *post terminum roll;* and the question was, Whether it should be received? if it was received, then the judgment would be of *Hilary* term, which was whilst the party was alive, and consequently it would be good: But *per Holt*, Ch. Just. this roll was not admitted to be filed; by the course of the Court, all the rolls of *Hilary term* ought to be brought in *before the essoin day of Easter term*, and a *post terminum roll* cannot be received without the leave of the Court, upon motion made for that purpose; and such leave is never granted, but where it appears to the Court that no body can be prejudiced by it, for it is dangerous; and though it hath been done, he would never consent that it should be done again, because by this means the *statute of frauds*, and the *statute for docketting judgments*, would be frustrated; for if the Court should allow the filing this roll in *Easter term* as a judgment in *Hilary* term, when it was not amongst the rolls of that term, or the vacation following, how could purchasers avoid it, when it was neither docketted, or to be searched after in that term, upon either of those statutes? so the court would not allow the filing it.

2. WOOLRIDGE v. CLOBERRIE.

[Mich. 4 Jac. Rot. 15. B. R.]

AN action on the case was brought against *four defendants*, and the plaintiff had a verdict and judgment, (it was for stopping his watercourse) one of the four defendants died before the trial; and afterwards, upon a writ of error brought, the * judgment was held to be erroneous as to him who was dead, and therefore it must be reversed against all the survivors, for it cannot be reversed in parcels: The difference was taken between actions founded on * *torts* and on *contracts;* in the first case, if there are several defendants, and one die before the verdict, yet the action shall stand; so if he die after verdict, the plaintiff may suggest the death of him *puis darrein continuance*, and take judgment against the survivors, but there needs no surmise to alter the *distringas* or the *venire*, for by the death of one defendant the action doth not absolutely abate: It is otherwise in actions founded upon *contracts*, which in their nature are entire; and therefore, in such cases, if it is suggested that one is dead, no † judgment shall be entered against the survivors. There is also a difference between verdicts at *nisi prius* and *at bar;* for if, after a verdict at the *nisi prius*, one of the defendants die before judgment, there, if it is entered against all, it is erroneous, but it is otherwise if entered after a trial at ‡ bar, for there the judgment relates to the verdict (*a*).

Action against some defendants, one died before the trial; the judgment against the rest was reversed.

* Cro. Eliz. 145. Cro. Car. 426, 509, 514. Jones 356, 367, 400.

† Comb. 186. Sid. 259.

‡ Poph 132. Roll. 768.

(*a*) *Vide stat.* 8 & 9 *W.* 3. *c.* 11. *Gilb. C. B.* 195. *Bull. N. P.* 312.

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3. ELLWAIES v. LUCY.

THE plaintiff brought trespass against four defendants, they all appeared, and after some continuances, three of them pleaded that the other died after the last continuance, & *petunt judicium de brevi & quod breve prædict' cassetur;* and upon demurrer to this plea it was adjudged ill, because they should have concluded, *et petunt judicium si Curia ulterius procedere vult;* for the writ actually abated by the death of the other defendant.

3 Lev. 120.

Trespass against four defendants, three pleaded, and the other died; the action is abated.

Comyns' Abatement, 1, 12. 1 vol. 3d ed. pa. 90.

DEBT.

1. WARD *v.* EVANS.

[Mich. 2 Annæ, 2 Ld. Raym. 928. S. C. Comyns 198. S. C.]

Mod. Cases 36.
2 Salk. 442.
Taking paper is no payment where there was a precedent debt.

THE case. *ss.* There was a debt of 50*l.* due to the *master*, who sent his *servant* with the *debtor* to receive the money; they went to a goldsmith, upon whom the debtor had a bill of 100*l.*, and the goldsmith indorses 50*l.* on that bill, and gave the servant *a bill upon another goldsmith for* 50*l.*, and the next day that goldsmith broke, and thereupon the *master* resorted to the first goldsmith, who refusing to pay the money, an action was brought against him by the *master*, and whether it would lie, or not, was the question: *Et per Holt*, Ch. Just., the taking a note in writing for goods sold may amount to a payment of the money, because it is a part of the original contract; but paper is no payment where there was an original and precedent debt as in this case there was, for it is intended to be taken upon this condition, (*viz.*) that the money be paid in a convenient time.

2. MARLE *v.* FLAKE.

[Trin. 12 Will. 3. B. R.]

Payment of money on a bond is a good plea before the condition broken.

PER Holt, Ch. Just., Payment of a bond with a condition indorsed, is a good plea before but not after, no more than to an action of debt upon a *single bill*, for when the breach is made, the benefit of the condition, which is always in behalf of the obligor, is gone.

But now see the Stat. 4 & 5 Anne for the amendment of the law.

1 Lev. 22.

3. Adjudged, that where the lessor assigned his rent without the reversion, that the assignee (if the tenant agrees) may maintain an action of debt for the rent, because the privity of contract is transferred.

2 Vent. 129.
Post 302.

4. The lessor made a lease, reserving 20*l.* *per annum* to be paid quarterly, debt may be brought for the last quarter's rent, without shewing the other three quarters were satisfied, for every quarter's rent is a distinct debt, and distinct actions lie for each quarter.

DEEDS.

1. THE *elder Saxons* made conveyances of their lands here, without deed or writing, (*viz.*) either by the delivery of a *turfe*, of a new staff, *&c.* The first deed concerning lands was made by *Withedrus king of Kent*, *anno* 694.; and that, and other subsequent writings made for such purposes, were called *chirographs;* but in the time of the *Normans* they were called *charters*, and afterwards *deeds*.

Spelm. Rel. 8.

2. ANONYMOUS.

[Pasch. 9 Will. 3.]

PER Holt, Chief Justice: When a deed is pleaded with a *profert hic in Curia*, the very deed itself is by intendment of law immediately in the possession of the court; and therefore when *oyer* is craved, it is of the court, and not of the party.

By a profert hic in Curia, the deed is in Court.

3. After *oyer* is craved, the deed is become parcel of the record, and the Court must judge upon the whole.

4. The demand of *oyer* is a kind of plea, and may be counterpleaded.

5. When a deed is not in Court, no *oyer* can be granted; therefore when *oyer* is prayed, it is always intended that the deed is in Court; and the words *ei legitur in hæc verba*, *&c.*, are the act of the Court.

Sid. 308.

6. In debt against an administrator upon a bond of his intestate, the defendant demanded *oyer* of the bond and condition *& ei legitur;* the condition was for performance of covenants in an indenture made between the plaintiff and the intestate; then the defendant prayed *oyer of the indenture* mentioned in the condition, though it was not in court *& ei legitur;* and then he pleaded, and the plaintiff demurred, so that the indenture was not in Court; it should have been produced by the defendant under the hand and seal of the plaintiff, and where it was made, and the substance thereof, that if it should be misrecited, or a wrong deed set forth, the plaintiff might plead *non est factum:* Now in this case he cannot plead that plea, because the defendant hath not alleged that it was the plaintiff's deed, and for that reason he cannot crave *oyer* of it, and get it truly entered, if it should be misrecited.

1 Saund. 8, 9.

Vide 2 Salk. 498.

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But adjudged, that, upon a *general demurrer*, it should be intended to be the true indenture, and that it was in Court; and that if the defendant had endeavored to trick the plaintiff, he might have complained to the Court.

1 Saund. 306.

7. In debt upon bond conditioned for performance of covenants in an indenture: The defendant craved *oyer* of the condition, and pleads, that he hath the indenture in Court, and that there are no covenants therein to be performed, *et hoc, &c.* The plaintiff prayed *oyer* of the indenture, which was entered *in hæc verba;* and it appearing that there were several covenants therein to be performed, he demurred to the defendant's plea; and adjudged good; for, upon *oyer* of the indenture, it is made part of the defendant's plea; so that it appearing judicially to the Court that he did plead a false plea, and averred against the truth of what appeared by the indenture; therefore the plaintiff needs not shew any matter of fact in his replication to maintain his action, but it is more proper for him to demur.

2 Lev. 113. Cro. Car. 399. Vent. 297.

8. Adjudged, that where a *chose in action* is created by a deed, the destruction of such deed is the destruction of the duty itself; as in case of a *bond, bill, &c.* but it is not so where an estate or interest is created by a deed.

1 Vent. 9, 210.

9. Debt upon bond; the defendant pleads, that he delivered it as an *escrow. Et hoc paratus est verificare;* and, upon a demurrer to this plea, it was adjudged ill, because he ought to show to whom he delivered it, and then to conclude, *et sic non est factum;* for this plea amounts to a special *non est factum*, and the plaintiff cannot reply, that he delivered it as his deed, and traverse, that he delivered it as an *escrow*.



10. ANONYMOUS.

[Mich. 3 Annæ.]

Date of a deed either express or implied.

PER HOLT, Ch. Just. A *date of a deed* is either express or implied; the express date is the very day and year in which the deed was made, and this is always intended when in pleading it is said, *bearing date;* the other is the implied date, which is the delivery.

DEFAULT.

1. STAPLE *v.* HEYDON.

[Trin. 2 Annæ, B. R. 2 Ld. Raym. 922. S. C.]

1 Salk. 216. Mod. Cases 1. Where the defendant is out of Court by default there can be no repleader.

THIS case is reported in 1 *Salk.* and in the *Modern Cases*, but not in the same manner as followeth: *ss.* In *trespass* for breaking his *wharf* and cutting down his *fences*, the defendant pleaded that one *Grey* was possessed of this *wharf*, and a *timber-yard* adjoining, for 90 years, and had and used *a way from the timber-yard over this wharf to the Thames*, and being so possessed, did demise the *timber-yard* to this defendant for seven years; and that the *fence* being thereon erected to stop his *way*, he cut it down, and that *he had no other way to the Thames.* The plaintiff replied, that he (the defendant) *had another way to the Thames;* upon which they were at issue, and the inquest was taken at the *nisi prius*, by default of the defendant; but the issue, whether he had a way to the *Thames*, or not, being *immaterial*, the Court was moved for a *repleader:* It was held, that this was an immaterial issue; but it had been otherwise, if the defendant had pleaded, that he had no other way to the *timber-yard;* but that there could be no *repleader*, because by this default the defendant was out of Court; then it was urged, that the trespass being not justified by the defendant, it was confessed, and therefore judgment ought to be given against him upon his confession; and not upon the issue and verdict; so is 3 *Cro.* 214. 1 *Leon.* 68. But *per Holt*, Ch. Just. Where the defendant confesseth a trespass, and avoids it by such matter as can never be made good by any manner of pleading, there judgment shall be given against him as upon his own confession, without any regard to the issue, and so is that case in 3 *Cro.* But where the defendant avoids and justifies by such matter as would have been sufficient if it had been well pleaded, (which is this very case) this, if ill pleaded, shall not be taken for a confession of the plaintiff's action; to which *Powell*, justice, agreed, for this was no more than a *nient dedire*, and not a plain and express confession.

DEMURRER.

1. ANONYMOUS.

Of special and general demurrers, and the reason of making the statute 27 Eliz.

PER Holt, Ch. Just. There were *special demurrers at common law*, but they were never necessary but in cases of *duplicity*, and therefore they were seldom practised; for as the law was then taken to be upon a *special demurrer*, the party could take advantage of no other defect in the pleading, but to that which was specially assigned for cause of his demurring.

2. But upon a *general demurrer* he might take advantage of all manner of defects, that of *duplicity* only excepted; and there was no inconvenience in such practice, for the pleadings being at bar *viva voce*, and the exceptions taken *ore tenus*, the causes of demurrer were as well known upon a general demurrer as upon a special one; therefore after the reformation, when the practice of pleading at bar altered, the use of general demurrers still continued, and thereby this public inconveniency followed, that the parties went on to argue a general demurrer not knowing what they were to argue, and this was the occasion of making the statute 27 *Eliz.*, by which it is enacted, That the causes of demurrer should be known in all cases, and this was restorative of the common law.

Kiel. 76. Allen 18.

3. Demurrer to the *evidence* admits the truth of the fact, but denies its effects in law; and if such demurrer is at the *assizes*, it shall be tried and determined in *B. R.* or in *C. B.*, *&c.* and if the demurrer is upon written evidence, the plaintiff must join or waive it; otherwise, if it is upon parol evidence.

3 Cro. 75.

1 Lev. 76.

4. Many things have been adjudged ill upon a special demurrer, which are otherwise upon a general demurrer; as for instance:

Vide Comyns' Pleader, Q. 4. Q. 9.

In trespass, the defendant pleaded a descent to him as heir, and did not say *filio & heredi*, or how he was heir; this is naught on a special demurrer.

5. So in debt upon a bond to save harmless, the defendant pleads *indamnificatum servavit*.

6. So *petit judiciu' si ab actione*, instead of *petit judiciu' & damna*.

DEPARTURE.

1. ANONYMOUS.

[Hill. 2 Annæ, B. R.]

IN *trespass, assault, and battery*, it was ruled by *Holt*, Chief Justice, that where the plaintiff laid the assault to be done *on such a day*, and the defendant in pleading some special matter justifies on another day, so that now by this pleading the day is made material, yet the plaintiff in his replication may allege the assault to be done on another day, and that this is no departure; it is true, it hath been held otherwise, but the later opinions are, that the day is not material, and that the plaintiff may maintain his declaration.

Assault laid to be done on such a day, &c. The day is not material. Str. 21, 806. Fortesc. 375. 1 Salk. 223.

2. *In replevin*, the defendant pleads, *liberum tenementum*, and damage-feasant there; the plaintiff in his replication confesses, that the defendant was *seised in fee*, but made a lease dated 26 *May* to *W. R.*, *habendum* from the date for thirty years; the defendant rejoined, that the said *W. R.* regranted to him the said term for thirty years, *habendum* from the 2[illegible]th *day of May* in the same month: Adjudged, this is a departure, for the day is to be excluded, and then there is a reversion for one day left in *W. R.* the first lessee, so that the defendant is tenant for years, reversion for one day to *W. R.*, remainder to the defendant in fee; now when the defendant pleaded a freehold, it must be intended a freehold in possession, which he should have maintained in his rejoinder.

1 Roll. Rep. 388. What is a departure. 2 Wilson 98.

3. A *departure*, in *Latin*, *decessus*, is a going off to new matter of justification; as for instance, where the defendant pleads no award made, and then rejoins, it was not *tendered;* so where he pleads *non damnificatus*, and then rejoins *de son tort demesne*, but where in covenant the defendant pleads performance, the plaintiff replies, he would not attempt; the defendant rejoins, he was robbed; this was held no departure.

1 Lev. 85, 127.

4. That which is pleaded at *common law* cannot be maintained *by custom*, as where the plaintiff brought an action *of covenant;* * the defendant pleaded *infancy*, and the plaintiff replied the custom of *London* to charge infants.

Sid. 142. Co. Lit. 304. a. 3 Leon. 40. Cro. El. 653.

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1 Lev. 81.

5. But if the defendant plead a *statute*, and the plaintiff replies, it is *repealed* or *expired*, the defendant may rejoin, that it is revived or continued, as the case is, and this is no departure.

DEPUTY. See Office 8.

1. BARKER *v.* KETT.

[Pasch. 13 Will. 3. B. R. 1 Ld. Raym. 658. S. C.]

Comyns 84, 85. 1 Salk. 95. Deputy may act in his own name.

THIS case is reported in 1 *Salk.* by the name of *Parker* versus *Kett*, to which may be added, as then adjudged, (*viz.*) That a *deputy* may act in his own name as well as in the name of his *principal;* and *Comb's* case in the *ninth report*, is not contrary; for though it is there held, that he who acts as an attorney must use the name of his principal, yet the judgment in that case is otherwise.

* 6 Rep.

2. That where a man hath an *interest* and an *authority*, and doth an act without reciting his *authority*, it may be intended to be done by virtue of his interest, as in * *Cleer's* case; but where a man hath an *authority only*, and doth an act which cannot be good but by virtue of that *authority*, though it is not recited so to be done.

5 Eliz. Dyer.

3. *Anno* 18 *H.* 7. the king granted the office of remembrancer of the Exchequer to one *Robert Blague*, to exercise by himself or *per sufficientem deputatem*, and *anno* 3 *H.* 8. he was made a baron of the Exchequer *quamdiu se bene gesserit*, and yet he still continued to exercise that office by deputy.

Plow. Com. 381.

4. A steward of a manor cannot make a deputy without special words in his patent enabling him so to do; because it is an office of trust and knowledge, which are qualities annexed to his person.

2 Mod. 173.

Vide Comyns' Officer, B. 13, 14.

5. Upon a bill in the *Dutchy Court*, the question was, Whether a stewardship of a manor could be granted in reversion? and adjudged that it might, because it may be granted in fee, or for any lesser estate, and so in reversion because it may be granted to be exercised *per se, vel sufficientum deputatum;* Sir *Robert Howard's* case.

DEVASTAVIT.

*ADJUDGED, That payment of an *usurious bond* is a *devastavit*, but a delivery of goods fraudulently sold by the testator himself, is not.

Hob. 167. Noy 129.

2. Payment of a *legacy* before a contingent *covenant broken* is not a *devastavit*, but if after it is broken, it is a *devastavit*.

5 Co. 28. Roll. Abr. 925. Cro. Jac. 8. Cro. Car. 362.

3. Payment of a *statute* whilst a writ of error is depending upon a *judgment precedent to the statute*, is not a *devastavit*.

4. In equity, the *executor of an executor* is liable as far as he hath *assets*, but he is not so at law; now by the statute 30 *Car.* 2. *cap.* 7. the executor or administrator of a wrongful executor is liable for a *devastavit* of the wrongful executor.

5. After *assets found*, or judgment upon a demurrer, the sheriff must return *assets* or a *devastavit*, (*i. e.*) he shall not return *nulla bona* generally, but he may return *nulla bona* in the same county.

6. An executor pleaded a *note of* 5000*l.* which, with *interest*, amounted to 7000*l.* and a judgment thereupon not satisfied, this was adjudged ill; for if *interest* did run in the time of the executor, it was a *devastavit* in him to suffer it, unless there was a defect of assets, which shall not be intended, and therefore the defendant ought to have shewed such defect, if there was any.

2 Lev. 40.

*7. A *feme covert*, who was executrix, survived her husband, she shall be charged for a *devastavit* committed or done by him; so likewise if the plaintiff had recovered against her husband whilst living, for a *devastavit* during the coverture, and then the husband dies, the widow shall be charged for the *damages*, but not for the *costs*.

2 Lev. 161. Feme covert surviving her husband, shall be charged in a devastavit by him.

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DEVISE.

1 Vent. 215.
Devise to W. R. for life, remainder to his heir, is a fee-simple.

1. ADJUDGED, that a devise to *W. R.* for life, remainder to his *heir*, is a *fee-simple*, for *hæres est nomen collectivum;* but if he add, and to the *heirs of such heir*, it is for life only, for, words of *limitation* being added to the word *heir*, it shall be taken as *designatio personæ* (a).

1 Vent. 228.
Devise to W. R. and to the issue of his body is an estate-tail, if he hath no issue at that time.

2. A devise to *W. R. and to the issue of his body*, if he have *no issue* at that time, it is an estate-tail, and the word *issue* is a word of *limitation*, for otherwise it would signify nothing; but it is otherwise if the said *W. R. had issue at that time*, for then it is a joint devise, or if it be the *remainder to the issue of the body of W. R.*, for then they take a remainder *in præsenti*, as purchasers (b).

1 Vent. 230.
Devise to W. R. and the heirs males of his body, is an estate in tail male.

3. A devise to *W. R.* and the heirs males of his body; and *if he die without issue, &c.* is only an estate in *tail male*, for an implication of an estate of inheritance shall never ride over an express estate limited before (c).

1 Vent. 2[illegible].
Devise to his heir male is an estate-tail.

4. A devise to *W. R.* for life, and afterwards to his heirs male is an estate-tail; but it would not be so if the estate was limited to his heir male, and the heirs of the body of such heir male.

1 Vent. 225.
To the issue of his body is an estate-tail.

5. The testator had three sons, and he devised his lands to his third son for life, and after his death to the *issue of his body* by a second wife, with power to make her a jointure, this is an estate-tail, for the word *issue* is *nomen collectivum*, and equivalent to *heir*.

Ch. Rep. 16.
Devise of a moiety to the wife, she shall have a full moiety.

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*6. The testator devised a *moiety* of his personal estate to his wife, and then several legacies to others, and the residue to another. *Et per Curiam*, the wife shall have a full moiety, and then the debts shall be paid and deducted out of the other moiety, if that be sufficient; and if there is money, bonds, and a lease for years, the wife shall have a moiety of the lease.

Ch. Rep. 240.
Devise to raise portions out of the profits, is a power to sell.

7. The husband devised his goods to be sold for the raising portions for his daughters; and that if the goods were not sufficient for that purpose, then the same to be raised out of the rents, issues, and *profits of his lease lands;*

(a) *Vide ac. Fearne's Cont. Rem.* 228. (102.) *Harg. Law Tracts* 506.

(b) *Vide Pollex.* 101. *S. C.* 3 *Keble* 42, 52, 95. 8 *Mod.* 384. *Bacon's Abr.* Devises, D. This case was between *King* and *Melling*.

(c) *Vide ac. Buls.* 63. *Dyer* 171. in marg. 2 *Vern.* 451.

the question was, Whether the leases might be sold, if the goods were not sufficient? *Et per Finch, Lord Chancellor*, the devise of the *annual profits* gives no power to sell, but a devise of the *profits* doth; and the affirmative words shall hinder the power in this case of a chattel, as it might in case the land had been freehold.

8. A writing was made in this form, (*viz.*) *This indenture made between, &c.;* whereas, &c. now in consideration of 5*s*. he bargains and sells to the parties to be disposed in manner following, all the rest I give and bequeath, &c., and I make the said parties my executors; this was adjudged a good will (*a*).

Ch. Rep. 249. What shall be a good will, though informal.

9. The father settled a lease, with reference to his will, in which he gave 500*l*. to each of his daughters, to be paid at the age of twenty-one; and if any or all died before that age, *then to others;* but devised no *maintenance* to them till their portions became payable. *Et per Curiam*, a maintenance cannot be decreed, because of the devise over (*b*).

Ch. Rep. 249. Devise of portions to be paid at 21, and if die before, then to others, a maintenance cannot be decreed, because of the devise over.

(*a*) An instrument, called a deed of gift, and having the form of a deed, was, by the judge of the Prerogative Court, in *Hill.* 1793, in the presence of the Editor, adjudged to be a will, though it was a disposition upon a contingency independent of the testator's death, and which might happen either before or after.

(*b*) *R. ac.* 1 *Atk.* 505. 3 *Atk.* 101. as to grandchildren or strangers; but *dict. contr.* as to children. *Vide* 2 Salk. 416.

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10. FISHER *v.* NICHOLLS.

Antea, Copyhold 1.

THE construction of wills is more favoured in law to fulfil the intent of the testator, than any deed or conveyance executed by him in his life-time.

Wherefore, where a man by deed gives lands to *W. R.* and *his assigns forever*, this is only an estate for life; but in a will these very words make an *estate in fee.*

What makes a fee-simple by will.

So a devise to *W. R.* being his eldest son, and his heirs, *after the death of his wife*, this is a good estate for life *by implication* in the wife; but it is not so in a deed.

Cro. Car. 266. Jones 343. Devise is not a conveyance by common law, but by custom.

Now, *per Holt*, Ch. Just., the reason of this diversity is not only, that the testator is intended to be *inops concilii*, but because a devise is not a conveyance by the *common law*, but by the *statute;* it is true, there were devises before the statute of *H.* 8. but those were not by common law but by *custom*, as in cases of *burgage lands;* now as custom enabled men to dispose of their estates in this manner, contrary to the common law, so it exempted this kind of conveyance from the regularity and propriety required in other conveyances; and thus it came to pass, that wills upon the statute, in imitation of those by custom, gained such favourable construction.

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2 Lev. Bowman v. Milbank. Where the heir shall not be disinherited, because the will was doubtful.

11. Adjudged, that when the devise was in these words, *I give all to my mother*, that by these words the heir was not disinherited, because it is uncertain what was intended by that word *all;* though it was insisted, that it included the whole estate both real and personal, for *qui omne dat nihil excipit.*

1 Lev. 11. Where the devise is only of an estate for life. 3 Lev. 434. 1 Sid. 47.

12. Devise to his eldest son for life, and if he die without issue living at the time of his decease, then to his second son and his heirs; but if his eldest son hath issue living at his death, then the fee-simple shall remain to his right heirs forever; adjudged, this is an estate for life in the eldest son, which is not drowned in the reversion he hath as heir, and that the remainder to his right heirs is not executed but contingent.

1 Lev. 135.

13. The wife was *tenant for life*, remainder to the right heirs of the husband, who devised his lands to the heirs of the body of his wife, if they attained to the age of 14 years, and died without issue; this is an executory devise, and no remainder to the heirs of the wife; for though she hath an estate for life, yet that was not created by the devise; but this is a new estate, and not joined to that of the wife.

1 Vent. 207.

14. Adjudged, that wills appointing a *guardianship* of a child upon the statute of *Car.* 2. cannot be proved in the Ecclesiastical Court; neither can they prove wills there for lands, but of goods and lands they may.

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DESCENT.

1 Vent. 416.

1. IN immediate descents there can be no impediment, but what arises in the parties themselves.

2. The grandfather is an alien or attainted, and hath issue the father who hath issue a son, and both denizens, the son shall be heir to the father, notwithstanding the disability of the grandfather; otherwise if the father had been attainted.

1 Vent. 413. 1 Inst. 87. contra.

3. An *alien* hath issue *two sons*, both *denizens*, the one may be heir to the other, though neither of them could be heir to the father; for the descent between the brothers is immediate, and there is no disability in them, though there is in the father.

4. A father *attainted* hath two sons, the one may be heir to the other, for the *descent is immediate;* and though the father is the *medium differens sanguinis*, yet he is not the *medium differens hæreditatis.*

1 Vent. 416, 428. Co. Lit. 8. a.

5. In *immediate descents*, a disability by attainder or being an alien, not only in the parties, but in any intermediate ancestor, through and by whom the descent is made, is an impediment, and obstructs the descent.

6. There were *three brothers, all aliens;* the two youngest were *naturalized*, and the eldest had issue, then the third brother died. Adjudged, that his land cannot descend to his eldest brother, or to his issue, because he was incapable himself, and his issue cannot come in but by representation; so they shall descend to the second brother.

7. *Per Holt*, Ch. Just. In his argument in the case between * *Clements and Scudamore*, all the lands *in England* were of the nature of *gavelkind* before the Conquest, and descended to all the issue equally; but after the Conquest, when *knight-service* was introduced, the descent was restrained to the eldest son, for the preservation of the tenure.

* 1 Salk. 243. Lamb. 167. Seld. Edm. 184.

But in both cases, the succession by right of representation was allowed, and so it has been in all nations.

Seld. de Success. cap. 23.

DISCONTINUANCE OF ACTION. [130]

See Issues joined 9.

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1. SALISBURY *v.* PROCTOR.

[Hill. 8 Will. 3. B. R.]

AN action was brought against two defendants, one joined issue, and the other demurred; the issue was tried, and there was a verdict against that defendant; so that no day was to be given to him; but as to the other, day should be given and *continuances* entered till judgment, but none being entered, a writ of error was brought, and these *discontinuances* were assigned for error; for being after verdict they could not be helped by the verdict. But, *per*

Discontinuances are helped after verdict. 5 Mod. 304.

Holt, Ch. Just. *discontinuances* are helped as well after the verdict as before; and so it hath been adjudged, for the statute saith, *where the fact is tried*, without relating to discontinuances before more than after a verdict (*a*).

(*a*) *R. ac. Rep. Temp. Hard.* 72.

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2. PHILER *v.* BOSON.

[Hill. 3 & 4 Will. 3. B. R.]

Statute of Jeofails extends to inferior courts.

ERROR on a judgment in the *Court of Exeester*; the error assigned was the want of a *continuance*, for it was *ad proximam Curiam, which is ill in an inferior court*; but *per Curiam*, the judgment being given upon a verdict, this *discontinuance* is aided; for the statute of *jeofails* extends to *inferior courts*, and must be favourably construed to give a remedy, and the words are, any *discontinuance, miscontinuance*, or *misconceiving of process*, which are general words, and applicable to all courts of law.

Saund. 258.

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3. ANONYMOUS.

[Pasch. 5 Will. 3. B. R.]

Discontinuance helped by verdict.

IN *trespass* and battery against *husband and wife*, the original, as recited in the declaration, was of a *battery* only *at one time*, but the declaration itself was of *several batteries* done by them at *several times*, to which several batteries the defendant pleaded; and the plaintiff replied as to one of them only, upon which they were at issue, and it was found for the plaintiff: *Et per Curiam*, the original not being set out by craving *oyer*, we will intend it to be right but misrecited at the top of the declaration; and the plaintiff not replying to one of the batteries is but a discontinuance, which is helped by the verdict.

Vide St. 4 Ann. ch. 16. 5 G. c. 13.

1 Lev. 140. Str. 76, 116.

4. After a demurrer argued, the Court will not give leave to *discontinue* in an action of a debt upon a bond to perform an award.

1 Lev. 191. 1 Sid. 306.

5. But it is not so in an action of debt for an escape.

1 Lev. 227. 1 Lev. 295.

6. Nor in an action of debt upon a *bail bond*, nor in debt upon a bond to accompt, nor in an *assumpsit* upon an accompt stated.

Hard. 504.

7. There shall be no *discontinuance* before judgment in the *king's case*, and therefore, if after issue joined and tried for part, it should be moved in arrest of judgment, that there is a *discontinuance* as to the part; this may be aided, for the king may either take issue upon it, or enter a *nolle prosequi* to help the *discontinuance*.

8. *Miscontinuance* is a wrong doing, but a *discontinuance* is not doing a thing; as *per Holt*, Ch. Just. *A.* sues the hundred for the robbery of *B.* his servant, the hundred imparles, and *idem dies dat' est præd. B.* now after verdict, the defendant is *sine die in* court, unless it is to move in arrest of judgment.

9. After a *special verdict* the Court may give leave to *discontinue*, for it is not a complete verdict; but this is a favour.

Hill. 5 Will. 3. Roev v. Golden.

10. *Discontinuances* are either to the prejudice of the heir, or of the successor, or of the wife, or of him in remainder or reversion, or of the jointress. *Per stat.* 11 *H.* 7. *cap.* 20. or against the *tenant by curtesy*, with warranty by the statute of *Gloucester*, *cap.* 13.

Discontinuance of estate.

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11. A discontinuance to the prejudice of the successor is remedied by the statutes 1 & 13 *Eliz.* and 1 *Jac. cap.* 3.

12. A *discontinuance* to the prejudice of the heir is hindered by the statute 32 *H.* 8., by which it is enacted, that the *wife or heir* may enter.

13. But *discontinuances* to the prejudice of remaindermen and reversioners still continue.

14. Some discontinuances displace or devest the estate only; others not only displace and devest it, but take away the entry, and this is properly a discontinuance, and it is where he who aliens hath an inheritance, either in his own right or in the right of another, as tenant in tail; as for instance, where the husband is seised in right of his wife, for they not only devest the estate, but put the wife or issue to their action, by taking away their entry.

15. Some discontinuances gain a *reversion in fee determinable* and some an *absolute fee;* if tenant in tail makes a lease for the life of the lessee, this is a *discontinuance* of the estate tail and the reversion, and therefore the tenant in tail hath gained a tortious reversion in fee, but determinable upon the life of the lessee.

16. For if tenant in tail make a gift in tail to *W. R.*, if he die without issue, the discontinuance is determined; but if he make it in fee, this is a discontinuance for ever.

17. *Tenant for life*, reversion to *W. R.* in tail, who bargained and sold to *W. W.* in fee, and then levied a fine of his reversion to *B.* in fee; adjudged, that *W. W.* had nothing by the bargain and sale, but an estate for the life of his bargainor descendible to his heir as a special occupant: But the fine having only barred and extinguished the estate-tail, and having passed nothing to the cognisee, the estate of the bargainee is become a base fee, descendible to his heirs as long as the bargainor has heirs of his body. See *Took* versus *Glascock.*

18. The husband covenanted to *stand seised* to the use of himself for life, remainder to his wife for life, remainder to the heirs males of their two bodies, remainder to his eldest son *W. R.*, who was born of the first venter, *&c.*; afterwards the husband and wife levy a *fine* to *W. W.* in fee, *with warranty*, and die without issue male, by [133] reason whereof the estate descended on *W. R.* the eldest son of the cognisor: Adjudged, that this *fine and warranty was no bar*, because a warranty cannot be a bar to the estate-tail of *W. R.* the eldest son, unless that estate was *discontinued*, and it could not be *discontinued*, unless the estate-tail to the cognisor was *discontinued* and *displaced* by the fine and warranty; and here the estate-tail to the husband and wife was not *discontinued*, because they were not seised of it at the time of the fine levied; for they were not seised in their demesne as of fee-tail, but the husband was tenant for life, remainder to the wife for life, remainder to the heirs-males of their two bodies, so that these are distinct estates which cannot unite, and by consequence the estate for life is not drowned in the estate-tail. See the case, *Stephens* versus *Britteridge*.

DISSENTERS, &c.

1. HILTON *v.* BYRON.

[Pasch. 11 Will. 3. B. R.]

Criminal case not within the statute for the ease of Quakers.

THE plaintiff *Hilton*, being a *Quaker*, moved for an attachment against *Byron*, offering to take his *solemn affirmation*, according to the late act, that he went in danger of his life; but the motion was denied, unless he would take his oath in common form, because this was a criminal case, and not within the statute.

2. THE QUEEN *v.* RIDE.

[Mich. 3 Annæ, B. R.]

A *POPISH recusant convict* made his wife executrix, and afterwards she was permitted by the Spiritual Court to prove the will; but a prohibition was granted, because she is disabled by the general clause of the statute *Eliz. cap.* 4. *Par.* 22., and not enabled by the *proviso*.

The wife and executrix of a popish recusant convict cannot prove his will.

3. THE KING *v.* LARWOOD.

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[1 Ld. Raym. 29. S. C.]

INFORMATION against the defendant for not taking upon him the office of sheriff of *Norwich*: He pleaded the statute *13 *Car.* 2. that he had not qualified himself, for that he had not taken the *sacrament* as enjoined by that statute, according to the usage of the church of *England*, &c. The attorney-general replied, that he was obliged, by law, and ought to have received the sacrament, &c. The defendant rejoined, that he was a protestant dissenter, and exempted by the toleration-act, which he set forth; and upon a demurrer to this rejoinder it was adjudged, that this is a private act, of which the Court cannot take notice without pleading it; that by several other *statutes all persons are to observe the discipline of the church of *England;* that the law took no notice of dissenters before this act of toleration, which extends only to such dissenters who take and subscribe the declaration at the quarter-sesions; that the statute 13 *Car.* 2. now pleaded by the defendant, doth not exempt men from serving in offices to which they were obliged before that act was made, but to qualify them to execute it, and that the subject cannot be exempted from this office, but by act of parliament or a grant from the king.

4 Mod. 269. 1 Salk. 167.
* Cap. 1. The subject cannot be exempted from the office of sheriff, &c.

* 1 & 23 Eliz.

DISSEISIN.

1. THE lessor made a lease to *W. R.* for eighty years, to commence *next Michaelmas*, if *W. W.* should so long live; and, after the death of *W. W.*, for thirty-one years

1 Lev. 45, 270.

longer: *W. R.* the lessee entered before *Michaelmas*, and continued the possession afterwards; the lessor entered upon him, and then the lessee assigned over the term: *Et per Curiam*, the entry of *W. R.* the lessee *before Michaelmas*, was a disseisin to the lessor, and not a possessio by virtue of the lease; and therefore the entry of the lessor did not disturb the possession of the term, for in that respect he is not possessed but only by the disseisin, which is hereby purged, and by consequence the term is well assignable.

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2. So it is if a stranger had entered on the lessee, that would have turned the term to a right, because he was not possessed by virtue of the term.

But if lessee for years had staid till *Michaelmas-day*, and then had entered, and afterwards the lessor had entered on him, it would have turned the term to a right, because he had a possession by virtue of the term, which being devested, he cannot assign such case before entry.

3. PAGE *v.* HEYWARD.

[Trin. 3 Annæ. Piggot's Recoveries 176. S. C. full.]

2 Salk. 570. Entry without an expulsion makes only a seisin.

THIS case is reported *in* 2 *Salk. quod vide;* in which it was held *per Holt*, Ch. Just. that a *bare entry* on another, without an expulsion, makes only a *seisin*, so that the law will adjudge him in possession who hath the right, and so are the words to be understood in a special verdict.

ss. Intravit & fuit inde seisitus prout lex postulat; but it will not work a *disseisin* or abatement, without an *expulsion*.

DISTRESS.

1. STANFITT *v.* HICKS.

[9 Will. 3. C. B. 1 Ld. Raym. 280. S. C.]

Where a distress was after the end of the term. S. C. 2 Salk. 413. Vide Legg v. Shudwick, 2 Salk. 414.

THE case was, there was a lease made *for one year*, and so *from year to year*, as long as both parties pleased; by virtue whereof the lessee entered, and was in possession for two years and *an half*, and the rent being in arrear the lessor distrained; and adjudged, that he could not by law, because by this agreement there was an estate for two years created, and no more; the other was a growing in-

terest or estate at will, which, being a distinct estate from the first, cannot be subject to the arrears of the first. The reporter tells us the law is contrary.

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2. HOWELL *v.* BELL.

[Mich. & Hill. 8 Will. 3. C. B.]

IN *replevin*, the defendant avowed, for that *W. R.* was seised *of the place where, &c. in fee*, and being so seised he granted a rent-charge out thereof to *W. W.* for life; that *W. W.* is dead, and that he (the defendant) *was his executor*, and distrained in the place where, for so much rent in arrear, and due to his testator in his life-time; but did not aver that the place where, *&c.* was then in the seisin of the grantor of this rent, or any other person who claimed by, from, or under him; and upon a demurrer to this avowry, *Holt*, Ch. Just. held, that the executor might distrain either on the grantor or any other person who comes in by or through him, and if the plaintiff is not liable to the distress, it is more natural for him to shew it in his replication, for his own defence. Besides, the statute (*a*) which empowers men to distrain, is a remedial law, and therefore ought to be expounded according to equity, and extended accordingly, and the words therein being *executors of tenants for life* may *ex vi termini* include all tenants *for life.*

Where an executor may distrain for rent in arrear to the testator.

(*a*) 32 *Hen.* 8. *ch.* 37.

3. ANONYMOUS.

[Mich. 8 Will. 3. C. B.]

IF cattle escape by the default of the owner, on the lands of the lessor, he may distrain them for rent, though not *levant and couchant;* but, if such escape be through the default of the lessee in not *repairing the fences*, the lessor cannot distrain them till they are *levant and couchant;* for if the lessor had the lands in his own hands, he must repair the fences, and consequently he must see that his lessee doth it, for he is not to take advantage of his own *default.

Where cattle may be distrained, though not levant and couchant. Vide Co. Lit. 47. b. 2 Saund. 289. Mod. Ca. 198. *See the King v. Larwood.

4. Adjudged, that the rule of the common law, which exempts *utensils*, *tools*, *instruments of husbandry*, *&c.* from *distress*, holds only in distresses *for rent arrear*, *amerciaments*, *&c.* but doth not extend to cases where a distress is given in the nature of an execution by any particular statute, as for *poor's rates*, *&c.*

Where a distress shall be made for utensils of husbandry. Vide 1 Bur. 579.

5. Trespass for taking two sheep; the defendant justifies *for toll* (*viz.*) *quod cepit & distrinxit* the said sheep for

2 Lutw. 1380. Where a distress is well pleaded.

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toll, and the same did carry away, as he lawfully might; it was doubted whether this was a good plea, because he did not say *cepit & asportavit nomine districtionis;* but it seems clearly to be naught, if he had not set forth before that *cepit & distrinxit.*

2 Lutw. 1536. Where two distresses cannot be for one rent. Cro. Car. 103.

6. In *trespass* for taking *ten beasts* 1 *April*, and also for taking *other twelve more*, on the said *first day of April:* The defendant pleaded, that the plaintiff had a lease granted to him, rendering rent, and that there was 70*l.* rent in arrear, and that he (the defendant) did take the first ten beasts for 60*l.*, parcel of the said 70*l.*, and the other *twelve beasts* afterwards for 10*l.*, residue of the said 70*l.*; and, upon a demurrer to this plea, it was adjudged ill; for one cannot avow for *two distresses* made for one and the same *rent;* it was the defendant's fault to distrain too little at first.

But the reporter tells us, that if the defendant had pleaded, that at the time of taking the first distress there was not sufficient to be taken for the whole rent upon the land, and that the first distress was but only of such a value, it had been good.

DISTRIBUTION.

Administrator bound to make distribution.

1. AN administrator at common law was bound to distribute the surplus of the intestate's estate; but this was altered by the statute 21 *H.* 8. *cap.* 15., by which he is not compellable, though he accepted the administration upon that condition; and this again is altered by the statute 22 & 23 *Car.* 2. *cap.* 10., by which he is compellable to make distribution, yet an estate *pur auter vie* is not to be distributed, though it be within that act; as for instance:

2. OLDISON *v.* PICKERING.

[Mich. 8 Will. 3. 1 Ld. Raym. 96. S. C.]

1 Salk. 464. S. C., by the name of Oldham v. Picker-

IN this case it was adjudged, that though an estate *pur auter vie* is made *assets* by the statute 29 *Car.* 2., yet it is not *distributable* within the statute 22 *Car.* 2. for distribu-

tion of intestates' estates, because distribution is a quality not necessarily included in the notion of *assets*, as payment of debts is; and this last statute is only, that goods and chattels shall be distributed; now an estate *pur auter vie* is not properly goods or chattels, but remains a freehold, though it is assets by the first statute.

ing. Estate pur auter vie is not distributable.

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3. PETT *v.* PETT.

[1 Ld. Raym. 571. S. C.]

AN intestate, having neither *father* or *mother*, *wife* or *children*, but only a *sister of his father*, and two daughters of his father's brother; a motion was made for a *mundamus* to the ordinary to make distribution, who had granted it to his father's sister. *Sed per Curiam;* by the statute 22 *Car.* 2. there shall be no distribution amongst collaterals after brothers' and sisters' children of the intestate; for that statute is a restraint on the common law, and therefore shall not be carried farther than the letter, and after such collaterals, it shall go to the next of kin to the intestate, which in this case was to his father's sister.

1 Salk. 250. Administration shall be granted to the aunt, and not distribution to the children of the uncle.

DIVORCE.

1. A DIVORCE *a vinculo matrimonii* is a bar of *dower;* but a divorce *a mensa & thoro* is not, for the marriage still continues, and therefore the parties thus divorced cannot marry again during their joint lives.

Noy 100.

2. A divorce for *adultery* was anciently *a vinculo matrimonii;* and therefore, in the beginning of the reign of *Queen Eliz.*, the opinion of the *Church of England* was, that after a divorce for adultery the parties might marry again; but in *Foliamb's case*, *anno* 44 *Eliz.*, in the Star-Chamber, that opinion was changed; and Archbishop *Bancroft*, upon the advice of divines, held, that adultery was only a cause of divorce *a mensa & thoro*.

Glan. 44. Bract. 92. 18 Ed. 4, 45.

3. Debt upon a bond against *Cecilia Wogan, alias dict' Cecilia*, late wife of *John Englebert:* The defendant

Cro. Eliz. 853.

pleaded, that, at the time of the making this bond, she was the wife of *John Englebert*, who was still living, *& sic non est factum*. The plaintiff replied, that the said *Cecilia* and the aforesaid *Englebert* were divorced, for that he had another wife: *Et per Curiam*, the sentence of divorce is but declaratory; the marriage was void *ab initio*, and therefore the woman was always sole, and by consequence her bond good.

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4. THE KING *v.* THE LORD LEE.

2 Lev. 138. Wife not separated from her husband by hard usage, but he bound to his good behaviour. Vide 1 Bur. 542.

UPON the complaint of the wife of the ill-usage of the husband, a *habeas corpus* was directed to him to bring her into court; who appearing, and several *affidavits* being read of the hard and severe usage, and of her *confinement*, and that she was in danger of her life; and she herself making oath of this matter, the Court bound him with sureties for his good behaviour, but they would not separate and remove her from him.

DOGS.

1 Cro. 125. 2 Cro. 44.

1. THE law takes notice of a *grey-hound*, a *mastiff*, a *spaniel*, and *tumbrel*, for trover will lie for them; and though a man hath a property in a *mastiff*, yet the thing is of so base a nature, that it is not * felony to steal a *mastiff*.

*7 Rep. 13. See the stat. 10 Geo. 3. c. 18. against stealing dogs.

†1 Saund. 84. 1 Sid. 336.

2. Where a *mastiff* falls upon another dog, the owner of that dog cannot justify the killing the mastiff †, unless there was no other way to save his dog; and therefore in *trespass* for killing his mastiff, if the defendant plead, that the mastiff fell upon the dog, and that he killed the mastiff lest he should worry the dog, it is naught, for, perhaps he might have saved him otherwise; but if he plead, that he could not take him off, part them, nor prevent the worrying of his dog otherwise than by killing the mastiff, this is a good justification: *Et per Curiam*, the owner of a mastiff is not bound to muzzle him, unless he be found to be mischievous.

2 Lev. 28. 1 Sid. 336. 1 And. 135. 2 Cro. 44.

3. Trespass for killing his dog, the defendant justified, for that he was owner of a warren, and that the dog was

there several times killing coneys, and then was running after them to kill them: *Et per Curiam*, this is a good justification, for it is the usage to kill cats and dogs in *warrens*.

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4. If a dog kill a sheep, not being used so to do, nor by the encouragement of another; *sed fortuito*, the master is not liable, no, though accustomed to kill sheep, unless the master did know it.

Dyer 25. Vide 2 Salk. 662. ante 12.

5. CHAMBERS *v.* WARKHOUSE.

TROVER *de sex catulis & quatuor catellis*, after a verdict for the plaintiff it was objected, that *catulus* signified little whelps, and *catellis* whelps of any sort, as of *dogs*, *foxes*, *&c.*; besides a man cannot have any property in *whelps*: *Sed per Curiam*, it shall be intended *whelps of dogs*, and a man may have a property in a *dog*, for trespass lies for taking away * *canem venaticam*, and the like action for killing a † mastiff.

3 Lev. 336. Where a man may have a property in a dog.

* Hob. 283. Dyer 306. † 2 Cro. 463.

DONATIVES.

1. DONATIVES are either by royal foundation or by royal license, or by original agreement with the ordinary; but, after it is established, the ordinary hath nothing to do with it, it is visitable by the patron's commissioners, it must be resigned to the patron, no lapse can incur: But *per Holt*, Ch. Just. the ordinary hath a power as to the parson, though not to the place; for if the parson marries without a license, or commits any misdemeanor, the ordinary may punish him in that respect, but he cannot regulate the seats in the church; and if the patron will not present, the ordinary may compel him; the parson is exempted from attendance at visitations.

The ordinary hath power as to the parson but not to the place. Co. Lit. 344. a. 2 Cro. 517. Danv. 46. 1 Geo. 1. St. 2. c. 10. s. 6. 1 Term Rep. 396.

Yelv. 61.

2. It has been formerly held, that a donative may be destroyed by the presentation of the very patron; but in *Ladd* and *Widdow's* case ‡ it was adjudged by *Holt*, Ch. Just. and the Court, that though a presentation might destroy an impropriation, it could not destroy a *donative*,

A presentation will not destroy a donative.

‡ 2 Salk. 541.

because the creation thereof was by letters patents, by which the land was settled to that parson and his successors, and he to come in by *donation: Et per Jones*, Just. institution to churches was not a temporal but a papal institution, which was not received in some places in *England;* and, where it was not received, they went on in their old way and method, and are called donatives.

1 Mod. 90.
Bishop not to visit a donative.

3. The incumbent of a donative, was cited into the Spiritual Court to take a license from the bishop to preach; and the pretence was, that it was a chapel, and that the parson was stipendiary: *Et per Curiam*, if it is a donative, and the bishop will visit, a prohibition shall be granted.

DOUBLE PLEA.

1. LAMPLUGH *v.* SHORTRIDGE.

[Pasch. 13 Will. 3. B. R. Comyns 115. S. C.]

1 Salk. 219.
Where a plea is double, where not.

THERE is a short note of this case in 1 *Salk.*, but the case was thus: It was a writ of error upon a judgment in the Common Pleas in an action of covenant, and the error assigned was for duplicity; (*viz.*) by pleading, that by such a deed *he released and confirmed*, which is double, and so is he * granted: *Et per Holt*, Ch. Just. where it appears that the conveyance pleaded cannot enure by way of release and confirmation, there to plead, that by that conveyance *relaxavit* and *confirmavit* is double, because the deed cannot enure to both purposes, as a bargain and sale, or a feoffment, but where the same deed may enure to both purposes, as a lease and release doth, there it is not double (*a*).

*1 Saund. 78.
2 Saund. 97.
Sid. 86. 1 Vent. 109.

(*a*) This was not the point of the case; but whether special cause of demurrer was sufficiently assigned.

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2. GAILE *v.* BETTS.

1 Mod. 227.
Where a plea is not double.

DEBT upon bond, the defendant craved *oyer* of the condition, which was to pay 40*l.* so long as the defendant should enjoy such an office, by quarterly payments

every year; then he pleads, that the office was granted to three for their lives, and that he enjoyed it as long as they lived, and so long he paid the said rent quarterly: The plaintiff replied, that he (the defendant), *enjoyed the office longer*, and *that he had not paid the money* by quarterly payments; and upon demurrer to the replication, it was objected that it was double: *Sed per Curiam*, it is not, for the defendant cannot in his rejoinder tender an issue upon payment of the money, because that would be a departure from his plea.

ECCLESIASTICAL THINGS AND PERSONS.

1. *ECCLESIASTICAL Courts* are either immediately derived from the crown, as a court of commissioners, for by the common law the king may grant a commission to hear and determine ecclesiastical causes and offences, according to the ecclesiastical laws, but not to use any temporal punishment, as fine and imprisonment, without the help of an act of parliament.

2. Or such courts are not derived immediately from the crown, and thus the law hath annexed to certain officers an ecclesiastical jurisdiction as incident to their office, as in the case of a *bishop*, who is *judex ordinarius* within his diocese; and so of an *archdeacon;* and though the process runs in the name of the *bishop*, yet the authority and jurisdiction is from the crown, like the process of counties palatine, which are in the name of the *count;* yet it is not to be doubted but the *palatine jurisdiction* was originally from the crown; and therefore the king hath a superintendant power over these courts, as he is *custos utriusq. tabulæ*.

3. Now as to causes determined in these courts it hath been held, that *matrimonial* and *testamentary* cases were anciently determined in the *temporal courts*, for they are not in their nature spiritual; that the proceedings in these courts are either between party and party, or *ex officio*, as public prosecutions, *&c.* but these cannot be without a presentment, and the party presenting must be upon oath, unless it be a public person, as a *parson*, *vicar*, *&c.* [143]

4. And none but those in orders can exercise ecclesiastical jurisdiction in these courts by the canon law; but

now by the statute 37 *H.* 8. *Doctors at law* may; and in such cases the *chancellor* of the bishop, who is usually a *doctor of law*, is judge, and therefore the bishop himself may sue before him, as the king doth before his judges, in his own courts.

Hob. 78. 1 Vent. 3.

Dean and Chapter. 2 Vent. 225.

5. By the usage in *England*, generally, the *archbishop is guardian of the spiritualties, sede vacante*, in his suffragan dioceses; but of common right, and consequently where such usage hath not prevailed, as to all matters of jurisdiction, except *ordination*, the *dean and chapter* are guardians of the spiritualties, and in cases of ordination they call in the aid of the next neighbouring bishop.

6. A *dean* cannot make a *proxy* to charge the possessions of the church, who is not of the chapter; but he and the major part of the chapter make a corporation, and their acts are good and binding, without the consent of the rest.

7. But a *dean* and chapter cannot act, grant, or *confirm*, unless they are *capitularitar congregati & semel in certo loco*, which may be in any place as well as in the chapter-house; for what they do at several times, and in several places, may be *factum singlorum*, but cannot be the act of the corporation.

Chanter and Præcentor. 1 Lev. 113.

8. *Præcentors* of old foundations are within the enabling clause of the statute of *H.* 8., but leases made by the *chanters of Paul's* must be confirmed, for they are *minoris ordinis*, (*i. e.*) mere singing-men, and not properly chanters.

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9. *THE CHURCHWARDENS OF* ST. BARTHOLOMEW'S *CASE.*

[Mich. 12 W. 3.]

1 Wilson 11. 1 Ster. 1192.

ONE *Fishburne* left 25*l.* *per annum*, for the maintenance of a weekly lecture, and the lecturer to be chosen by the parishioners, and to preach on what day of the week they should like best. The parishioners fixed on *Thursday*, and chose a lecturer every year; and now one *Turton* being lecturer, and the parishioners having chosen one *Rainer*, he was opposed by *Turton*, who would not submit to their choice, whereupon the churchwardens shut *Turton* out of the church; but the Bishop of *London* determined in favour of *Turton*, and granted an inhibition and *monition, &c.* *Sed per Holt*, Ch. Just. a prohibition was granted to try the right; for no man can be *lecturer* without a licence from the bishop or archbishop; but their power is only as to the fitness of the person; but not as to the right.

ERROR OF JUDGMENTS IN SUPERIOR COURTS.

1. LYNCH *v.* COOT.

IN this case it was held by *Holt*, Ch. Just., that if the plaintiff in error lie still after a writ of error brought, this is no discontinuance of the writ; but that the defendant in error hath no other way but to bring a *scire facias* against him, to shew cause *quare executionem non haberet* (a); and it will be no plea for the plaintiff in error to plead, that there is a writ of error depending, but he must assign his errors forthwith, after such *scire facias* brought; and in this case there is this difference, (*viz.*) if the *scire facias* is entered on the same roll with the writ of error, then he may assign errors without a *scire facias ad audiendum errores*, otherwise not.

Where the defendant in error may bring a scire facias quare executionem non haberet. Vide Carth. 41.

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(a) The Court will not grant *oyer* of this *sci. fa.*, or allow any plea to it, save an assignment of errors. *Miles* v. *Wolsterm*, 2 *Cromp.* 372.

2. FINCH *v.* RENEW.

[Mich. 12 W. 3. B. R. 1 Ld. Raym. 610. S. C.]

IN *partition*, the judgment was, *quod fiat partitio;* but before the final judgment was given a writ of error was brought; and it was held, that the record was not *removed for that cause, whereupon the writ of error was quashed.

Where the record is not removed.

*Because the writ of error comes too soon, it will not lie till after the final judgment, viz. Quod partitio facta sit firma. 2 Bulst. 104, 114. Moor 643. Cro. Eliz. 635. 11 Rep. 38. Stiles 290. Co. Lit. 168. 2 Roll. 126. 2 Cro. 324. 1 Roll. 750. Latch. 212.

3. LAMPTON *v.* COLLINGWOOD.

[Mich. 6 Will. 3. 1 Ld. Raym. 27. S. C.]

IN a writ of error brought by the bail, it was assigned for error in a writ of error, *coram vobis residen'* in *B. R.*, that there was no *capias* but only a *scire facias* against the principal; but it was disallowed, for this is an error in fact, but no error in the court.

4 Mod. 311. 1 Salk. 260. Carth. 282. Comb. 325. Holt 270. No capias against the principal is error in fact. Vide Str. 197.

4. PRINN v. EDWARDS.

[Trin. 7 Will. 3. B. R. 1 Ld. Raym. 47. S. C.]

Writ of error depending, no good plea, if it concludes with eat sine die.

DEBT upon a judgment; the defendant pleaded a writ of error depending in the Exchequer-chamber, and so prayed, that *eat inde sine quousq;* adjudged an ill plea, because no re-summons lies in this case, as it doth in excommengement, and other cases (*a*).

(*a*) The defendant should have concluded *quod breve cassetur*. *Vide* the Rep. in Ld. *Raymond*.

5. BADGER v. LOYD.

[Mich. 1 Annæ, B. R. Cited in 2 Ld. Raym. 808. S. C.]

Where the plaintiff may enter though the writ of error is depending. Holt 199. S. C.

IN this case it was said *per Holt*, Ch. Just. that it was adjudged, that pending a writ of error, the plaintiff in the original action may enter if he can; for though this writ forecloses the Court, and ties up their hands, yet it doth not alter the right of the parties.

6. KNOLL'S *CASE*.

Errors in fact must be redressed in B. R. and not in parliament. 1 Sid. 208.

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PER Holt, Ch. Just. It is beneath the dignity of the House of Peers (that being the supreme judicature) to try matters of fact; and for that reason errors in fact, of any judgments in *B. R.* must of necessity be redressed there, and not in parliament.

7. ANONYMOUS.

Where a writ of error is brought and no record certified, &c. the defendant may have a writ de executione judicii. Vide 1 Wils. 35.

WHERE a writ of error is brought, and no record certified at the day of the return of the writ, the defendant in error taking a certificate of this matter from the proper officer of the court where the writ is returnable, he may take out a writ *de executione judicii* of course, and the party cannot hinder execution thereupon, without he brings a new writ of error.

8. BALL v. RICHARDS.

1 Vent. 165. Where all must join in a writ of error. Vide Str. 683.

ERROR of a judgment in ejectment against several defendants, and the writ concluded *ad damnum ipsorum*, which must be against all, when it appeared by the record,

that the judgment was against three, and that all the rest were acquitted; *per Curiam*, yet the writ of error is well brought, for all must join in the writ, which is only a commission to examine errors; and *ad damnum ipsorum* may be intended only of those who were found guilty, *viz.* that they were damnified by this judgment.

ERROR.

1. EVANS *v.* ROBERTS.

[Mich. 2 Annæ, B. R. 1 Salk. 265, called *Gibbons* v. *Roberts*.]

Mod. Cases 61. An inferior court held, secundum legem mercatoriam juxta consuetudinem civitatis, good.

ERROR of a judgment in the court at *Bristol;* the error assigned was, that the action there was said to be in a court held before the sheriffs and bailiffs of *Bristol*, *secundum legem mercatoriam juxta consuetudinem civitatis prædict' a tempore cujus contrarium, &c.* whereas *per legem mercatoriam* ought to be before the *mayor of the staple;* but adjudged well enough, because it was *juxta consuetudinem civitatis*, like the case of the Court of *Piepowders: Then it was objected, that the writ of error was directed to the sheriffs to remove *loquelam coram vobis residen'*, and the record removed was *loquela*, before their predecessors, sheriffs: *Et per Curiam*, where a *fi. fa.* comes to a sheriff, and he goes out of his office before it is executed, his successors may execute that writ, because the writ is general, and not directed to any particular *sheriff by name;* but it is otherwise if it was directed to a sheriff by name; a writ of error to the Court of Common Pleas is always directed to the *Chief Justice* of that Court by name; and there must be no variance in such case, but in the principal case it was held well enough.

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*1 Cro. 46. Saund. 87, 311

On a judgment in B. R. a writ of error will lie, either in Parliament or in the Exchequer-chamber.

2. Adjudged, that upon a judgment in *B. R.* a writ of error lies, either in parliament or in the Exchequer-chamber, at the election of the party; but, upon a judgment in the Exchequer-court, a writ of error will not lie in Parliament (*a*).

A writ of error in B. R. will not lie on a judg-

3. The defendant was indicted in *B. R.* and found guilty, and he brought a writ of error in the same court, and

(*a*) *Vide 2 Salk.* 511.

ment given in that court for error in law, but for error in fact in civil cases; but it is otherwise in criminal cases. 1 Lev. 139. 1 Sid. 208.

assigned error in law: *Et per Curiam*, if judgment is given in *B. R.* in *civil actions*, a writ of error will not lie in the same court, but only for errors in fact triable by a jury; but, upon a judgment in *criminal cases*, error will lie in *B. R.*, whether the error be in fact or law; but it lies also in Parliament.

Vent. 252. Where in nullo est erratum is a demurrer. Yelv. 58. 2. Cro. 521. 1 Lev. 311.

4. Adjudged, that where matter of fact is insufficiently alleged, *in nullo est erratum* is a demurrer; so it is if matter of fact is alleged against the record.

Where matter of fact is well set forth with matter of law. 2 Lev. 38.

5. But if matter of fact is well set forth with matter of law, it is a demurrer as to the doubleness; but that must be specially assigned, or otherwise *in nullo est erratum* pleaded, the matter of fact will be confessed, and the matter in law referred to the judgment of the Court.

Bail, where it shall not be on a writ of error. Yelv. 227. 2 Buls. 53.

6. Where the first judgment is upon an *insimul computasset*, or upon an *award*, and a writ of error is brought, there shall be no bail within the statute 3 *Jac.* 1. *cap.* 8., because these are not cases within the words of that statute, (*viz.*) *actions founded on bills or obligations for payment of money* (a).

* Yelv. 227.

7. But if the first judgment was in an action on a bond for payment of money, as *W. R.* should declare was due to him (the plaintiff) upon accompt, there he must find bail on a writ * of error brought on a judgment in such action; because, though this writ is *de jure*, yet being generally brought for delay, the statute shall be favorably expounded, and this was an obligation for payment of money; it is true it is uncertain at first as to the sum, but reduced to a certainty before the action brought. *Lev. Mich.* 15. *Car.* 2. Dean and Chapter of *St. Paul's* versus *Capell.*

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(a) But these cases fall within *stat.* 13 *Ch.* 2. *c.* 2., 16 & 17 *Ch.* 2. *c.* 8.

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5. GROENVELT *v.* BURWELL.

[1 Salk. 263.]

Where an inferior court proceeds different from the Courts of Common law, B. R. may examine their judgments by certiorari, but not by writ of error.

PER Holt, Ch. Just. In Courts newly constituted, and which are empowered to proceed in a method different from the Courts of Common Law, their judgment is not subject to a writ of error; but yet *B. R.* may examine them by *certiorari* or *mandamus*.

9. Where a judgment in *C. B.* is affirmed upon a writ of error in *B. R.* and afterwards a *scire facias* is brought on that judgment, and the plaintiff obtains judgment thereon; no writ of error lies in the Exchequer-chamber, because the record was not in *B. R.* by bill, as the statute requires, but by writ of error.

1 Roll. Rep. 264. Where a writ of error will not lie in the Exchequer-chamber.

ESCAPE.

1. SIR WILLIAM MOOR'S *CASE.*

[Hill. 2 Annæ, B. R.]

A PRISONER escaped, and was re-taken upon a *Sunday*, by virtue of a judge's warrant, usually called an *escape-warrant*, *by virtue of the statute of* 1 *Annæ;* and it was now moved that he might be discharged, for the taking him upon a *Sunday* is within the statute of † *Car.* 2., which is very true, if this had been a taking upon an *original process*, but * it is a re-taking, in the nature of a fresh pursuit, and the *marshal* might re-take a man upon a fresh pursuit, with or without a warrant; and such re-taking, though upon a *Sunday*, is not within the statute; and if so, he may be re-taken by an *escape-warrant upon a Sunday*, for the words of the late act are general, without any limitation as to time; and the defendant having done a wrongful act, ought not to be suffered to take advantage of it. *Nota:* It is held otherwise in *C. B.*, and the barons were divided in the Exchequer.

Mod. Cases 95. 2 Salk. 626. by the name of Parker v. Sir W. Moor.

† Cap. 16. and 5 Annæ, c. 5. Retaking a person upon an escape-warrant; though on a Sunday, is not within the statute.

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2. WILLIAMS *v.* CRAY.

[Pasch. 7 Will. 3. B. R. 1 Ld. Raym. 40. S. C.]

AN executor brought an action on the case against a sheriff, for a false return of a *fieri facias* delivered to him by the testator; after a verdict for the plaintiff it was objected in arrest of judgment, that this action would not lie, because it was only a personal tort done to the testator, which *moritur cum persona: Et per Curiam,* an *executor*

5 Mod. 403. 1 Salk. 12. Executor brought an action for a false return of a fi. fa. brought by his testator, and good. 1 Roll. Ab. 913. a. 2 Cro. 247.

cannot have an action for an escape upon *mesne process*, because that is merely personal, but he may for an escape upon a *capias ad satisfaciend'*, or for a false return of a *fieri facias*: and this by the equity of the statute 4 *Ed.* 3., because the right being determined after judgment, the *tort* is more than *personal*.

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3. RICH v. DOUGHTY.

[Pasch. 3 Annæ, B. R.]

Mod. Cases 154. Where the defendant was wrong taken by an escape-warrant.
*5 Annæ, cap. 5.

THE defendant escaped out of prison, and was re-taken by virtue of an *escape-warrant* upon the statute 5 *Annæ*, by a rabble, without any officer, as the statute directs, and was by them brought to the sheriff, who detained him by virtue of that warrant; and, upon an *habeas corpus* brought, the sheriff returned, that *Doughty* was brought to him by *W. R.* and others, to him unknown, by virtue of a warrant, *&c.*; and that he (the sheriff) detained him in custody *juxta exigentiam brevis: Et per Holt*, Ch. Just., this was adjudged an insufficient return; it is true, the warrant was good, but being illegally executed, the sheriff ought not to detain him, for he shall not graft a legal imprisonment upon an illegal one; he ought to receive the prisoner from no person but an officer, or from one under that denomination.

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4. TILDEN v. PALFRIMAN.

[Mich. 2 Annæ, B. R.]

1 Salk. 213, 345. S. C. Where a man is actually in custody, the entry of an action in the marshal's book is a good commencement of the action.

THERE is a short note of this case in 1 *Salk.* 213.; and the same again, and in the same words, *fo.* 345.; but the case was thus: *W. R.* being indebted to the plaintiff upon bond for 100*l.* was arrested, and afterwards being in the custody of the *marshal*, he escaped, and being retaken upon an *escape-warrant*, he was committed to *Newgate*, and having compounded the debt for 30*l.* paid to the plaintiff, he was discharged from that action by the plaintiff, and set a liberty; afterwards *H. H.* another creditor, finding him at large, arrested him in another action, and so he was brought to the *marshal* again, who suffers him to escape the second time; and afterwards *H. H.* entered an action against him in the *marshal's* book, by *remanet in custodia: Et per Curiam*, where a man is actually in custody, the entry of an action in the *marshal's* book may be a good commencement of such action against the party, because when he is in custody there is no serving of process upon him; but it is otherwise where he is

at large, as he was in this case, though it was by escape, because there you have the advantage of process against him; but it was not resolved how long the *marshal* shall keep him without a declaration delivered (a) or bail filed.

Jones 144. Where fresh pursuit and re-taking is a good plea, and where not. Cro. Eliz. 657. 2 Str. 873.

5. *Case*, *&c.* in which the plaintiff declared, that *W. W.* was in execution upon a judgment, and that the defendant suffered him to escape (*viz.* at *D.* in *Com. H.*) the defendant confessed the judgment, and that the said *W. W.* was in execution, and that he escaped from him at *S.* in the county of *M.*, and that he made fresh suit after him, *ante exhibitionem billæ præd.* and re-took him: *Et per Curiam*, if the gaoler re-takes a person escaping before any action brought, he is excused; but it is not so if the action was brought before the re-taking, for he having given the plaintiff a just cause of action, and that being well commenced, shall not be defeated by any subsequent matter: It is like the case of an action of waste, if the defendant plead he repaired before the action brought, it is a good plea, but not afterwards.

(a) The prisoner is entitled to be discharged, unless the plaintiff declares within two terms. *Reg.* 2 *G.* 1. The term in which the writ whereby he is arrested is returnable, is accounted as one. 2 *Cromp.* 14.

ESTOPPEL. [151]

1. TREVIVIAN *v.* LAWRENCE.

[Pasch. 3 Annæ, then argued. 2 Ld. Raym. 1036, 1048. S.C.]

1 Salk. 276. Where the party cannot aver against a point tried.

SCIRE facias brought by an administrator on a judgment in *Trinity term*, *&c.* (whereas the judgment was of *Michaelmas term*); and all the tertenants, except one, appeared, and pleaded *nul tiel record*, and judgment was had against them upon this plea to that *scire facias*, and execution awarded, and thereupon the plaintiff sued out an *elegit* and *extent*; and now, upon an ejectment brought at the trial, it was discovered, that there was no such judgment as recited in the *scire facias*, for that was a judgment in *Trinity term*, whereas the judgment was of *Michaelmas term* following; thereupon the jury found all

this matter specially. And now it was argued, that there being no such judgment as that recited in the *scire facias*, for that was a judgment of *Trinity term*, whereas the judgment given in evidence was of *Michaelmas term;* this must be a failure of the record, which is very true. But *per Holt*, Ch. Just. the *scire facias* being returned, and the defendants having appeared, and pleaded to it *nul tiel record*, and judgment being given, *quod habetur tale recordum*, it is now too late to make this objection; for the party is so estopped that he can never aver against it in the point tried; even the *issue in tail* cannot falsify in a point tried; and as to *estoppels*, the *Chief Justice* held, that an *estoppel* in pleading doth not bind the jury, unless it works upon the interest of the land. That where a plaintiff declares upon a demise (which really was by indenture), and the defendant pleads, *nihil habuit in tenementis;* if the plaintiff take issue upon that plea, the jury, notwithstanding the indenture, may find that the lessor had nothing in the tenements *tempore dimissionis*, and give a verdict for the defendant; but if, instead of *nihil habuit in tenementis*, the defendant had pleaded *nil debet* and issue thereupon, if the defendant give in evidence, that the plaintiff *nihil habuit in tenementis*, he (the plaintiff) may in such case take advantage of his [152] indenture, by way of estoppel, because he could not have that advantage of it in pleading, as he might in the other case; so likewise, if a mortgagee brings an ejectment against the mortgagor, and he pleads not guilty, the mortgagor shall never be allowed to give in evidence a precedent mortgage, he being estopped as to that matter. Judgment for the plaintiff.

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2. PLEDDALL *v.* FREAK.

[Pasch. 8 Will. 3.]

Where a demurrer to a misnosmer is not good.

DEBT upon bond against *William Freak;* the defendant pleaded his name is *Walter;* the plaintiff demurred, supposing that the defendant was estopped by the record, to say his name was *Walter;* but judgment was given *quod billa cassetur;* for the plaintiff should have pleaded it.

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3. HOLMAN *v.* HORE.

1 Salk. 275. Where an estoppel is conclusive.

THIS case is reported in 1 *Salk.* by the name of *Gilman versus Hore;* to which may be added, (*viz.*) that some *estoppels* are absolutely conclusive, and some by conclusion give an interest. The lessor made a lease to *W. R.* for

twenty years, and about a year afterwards he made another lease to *W. R.* for twenty years; now if there was an *attornment* to this second lease, then it amounts to a *grant of the reversion* of the lessor; but if no *attornment*, then it is a *lease by estoppel:* So where a man makes a lease to *B.* for twenty years, and about a year afterwards makes another lease to *C.* for twenty years, this is a lease by *estoppel*, and the rent is payable for the whole term; but if he enter upon the first lessee, and then make a lease to *C.*, who is turned out by *B.*, it is no lease by estoppel, but only a future interest for the last year.

EVIDENCE. See Prohibition, 4. [153]

1. IN *ejectment*, the plaintiff gave in evidence a counterpart of an old lease, which he found amongst the writings of his grandfather's title, but there were no witnesses to this lease, yet it was allowed good evidence; for the deeds about that time (which was in the reign of *Queen Eliz.*) were often without any witnesses.

1 Lev. 25. Where a counterpart of an old lease, without witness, was allowed as evidence. 12 Vin. Ab. 104.

2. The plaintiff could not produce any *letters of administration*, yet to prove himself administrator he produced the book of the spiritual court, wherein there was an order entered, that administration shall be granted to him, and this was allowed to be good evidence.

1 Lev. 25, 101. An order, that administration should be granted, was read as evidence. Keble 43, 509. 12 Vin Ab. 81.

3. Upon an issue joined whether executor or not, the plaintiff, to prove himself executor, produced the *probate of the will;* the defendant may plead, that the seal was forged, or that there was a *repeal*, or that the testator had *bona notabilia*, but he cannot give in evidence, that this was not his will, or that another is executor, or that the testator was *non compos;* because the ordinary is judge of these things, and his acts are conclusive, and the party is estopped to falsify them, as he would do, if this should be admitted to be evidence.

1 Lev. 235. Probate of a will given in evidence to prove the plaintiff executor. Gilb. Law of Evid. 1st. ed. 71. Str. 481, Cowp. 322. 3 T. R. 127.

4. ANONYMOUS.

[Hill. 8 Will. 3. C. B.]

12 Vin. Ab. 185.

ADJUDGED, That, upon *plene administravit* pleaded, the defendant cannot give in evidence payment of judgments, *&c.* since the issue joined, nor since the writ purchased, because the issue is, whether *plene administravit* at that time; but though he cannot give such payment in evidence, yet he may plead it.

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5. ANONYMOUS.

[Hill. 8 Will. 3. B. R.]

1 Salk. 278. 1 Ld. Raym. 153.

RULED *per Holt*, Ch. Just., That upon *non assumpsit* pleaded, the defendant cannot give the *statute of limitations* in evidence, because the issue is joined in the *prœtertense*, (*viz.*) upon what was done,and the evidence only proves the effect thereof to be now avoided; but, upon *nil debet*, the statute may be given in evidence, for it proves there is nothing now owing according to that issue.

6. LYNCH *v.* CLERKE.

Where a copy of a fine or recovery shall be evidence. 1 Salk. 287. Bull. N. P. 227. Str. 387. Espinasse 783.

PER Holt, Ch. Just. the substance of a deed cannot be proved, but by the deed itself, unless it is burnt, or lost, or in the possession of the plaintiff himself; and if so, then this matter, as it happens, must be sworn, and that the deed was executed: And in this case he said, that a copy of a *fine or recovery* is good evidence, so as it be sworn to be a true copy and examined; so likewise an *old deed* is good evidence, without any witness to swear that it was executed: That wherever an original is of a public nature, and would be evidence, if produced, an immediate sworn copy thereof will be evidence, as the copy of a *bargain and sale*, or *of a deed inrolled*, *of church register*, *&c.*; but where an original is of a private nature, a copy is not evidence, unless the original is lost or burnt (*a*). He likewise said, that if the plaintiff will read the defendant's answer in Chancery against him in evidence, the defendant may likewise take advantage thereof, for all is evidence or none.

(*a*) *Vide* Lord *George Gordon's* case, *Doug.* 590, (569.), and Mr. *Douglas's* note, (3), whereby the correct principle is recognized to be as here laid down.

7. HOE *v.* NELTHROPE.

[Hill. 8 Will. 3. B. R. 1 Ld. Raym. 154. S. C.]

IN this case it was held *per Holt*, Ch. Just. That the copy of a *probate of a will* is good evidence, where the will itself is of chattels, for there the probate is an original taken by authority, and of a public nature; otherwise, where the will is of things in the *realty*, because in such case the ecclesiastical courts have no authority to take probates, therefore such probate is but a copy, and a copy of it is no more than a copy of a copy.

Where a copy of a probate of a will is evidence. Str. 126. Cowp 17. Doug. 572. 1 Ld. Raym. 744.

8. MANN *v.* CAREY.

[Pasch. 9 Will. 3.]

THE question being proposed in this case to the justices of the Common Pleas, whether the *copy of a bank bill* remaining upon the file in the Bank of *England*, was good evidence, or not: They all agreed that it was, and that it was like the copy of an inrolment of a parish register, the Bank being a public body established by act of parliament for public purposes.

Copy of a bank bill upon the file in the Bank of England is evidence, ante pl. 6. 12 Vin. Ab. 97, 99.

9. ANONYMOUS.

PER Holt, Ch. Just. Where a person is convicted of *perjury upon the statute*, and afterwards pardoned, yet he cannot be a witness, for the punishment is part of the judgment appointed by the statute; but it is otherwise if the conviction was at common law.

Convicted of perjury, though pardoned, cannot be a witness. 2 Salk. 691.

10. THRUSTON *v.* SLATFORD.

[Mich. 12 Will. 3.]

IN this case it was held, That a *bill of exceptions* would lie at a *trial at bar*; as well as at the *nisi prius*, for the words of the statute are, that the *justices* shall sign it; which word *justices*, being in the plural number, cannot be well understood of any other justices than those of the courts at *Westminster:* And *per Holt*, Ch. Just. where a judge admits that for evidence which is not evidence, there the party must not demur, for if he doth, he admits the

1 Salk. 284. Where the party must not demur to the evidence.

evidence to be good, but denieth the effects of it (a), and therefore in such case he must bring his bill of exceptions; and so it is if the judge will not admit that for evidence which is evidence.

2 Vent. 295. Com. Pleader, E. 15.

11. Adjudged, that where there is special matter to avoid the plaintiff's action, which the defendant cannot give in evidence upon the general issue; in such case he must plead it specially, but he needs not where he may give it in evidence upon the general issue.

1 Salk. 394.

12. So wherever there is a mere matter of fact to avoid the plaintiff's action, the defendant may plead the general issue and give it in evidence; but if that matter of fact contains likewise matter of law, the defendant may either plead specially or generally, and give the special matter in evidence.

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Vide Bull. N. P. 299.

13. Adjudged, that where the issue is payment at the day and place, in such case, payment before the day, or at any other place, is good evidence, for payment before the day is payment at the day.

Bull. N. P. 140, 175. 6 Co. 47. Cro. Jac. 55.

14. So if the issue is *assets* at such a place, it is good evidence to prove assets at another place; for assets any where is assets every where.

(a) On a demurrer to evidence, the only question for the consideration of the Court is, Whether it was such as ought to be left to the jury in support of the issue joined? *Bull. N. P.* 313. *Doug.* 119. 2 *H. Bl. C. B.* Part 2.

EXCEPTION.

1. CUDLIP *v.* RUNDALL.

[Hill. 3 Will. 3. B. R.]

4 Mod. 11. Sho. 311. That it was an action on the case. What shall not be an exception out of an exception.

COVENANT, *&c.* in which the plaintiff declared, that he being possessed of a messuage, demised it to the defendant for seven years, and that he so negligently kept his fire that the house was burnt; upon *non demisit* pleaded, the jury found a special verdict, (*viz.*) that the plaintiff demised the said house to the defendant, with all out-houses, *&c.*; *except the new house* lately built upon the premises, for the use of the plaintiff and his family, and

not to be let to any other person whatsoever; and at all times when the plaintiff should not dwell there, to be used by the defendant and his assigns: The question was, What estate or interest the defendant had in this *new house?* and adjudged, that he was only tenant at will, because the *new house* was well excepted, which exception was not avoided by the words which follow, (*viz.*) *And at all times to be used by the defendant when the plaintiff doth not dwell there;* for that sentence doth not enure as an *exception out of an exception*, which sets the matter at large, but only as a declaration of the plaintiff's intention in making the exception; therefore this action will lie.

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2. WILSON *v.* ARMORER. [157]

DEBT against an *heir*, who pleaded, that he had *nothing by descent, &c.* The jury found a special verdict, that the father was seised in fee, and made a feoffment to several uses (*excepting two closes for his own life*): Adjudged, that these closes *descended* to the heir, because there was no use limited in the closes; besides, this exception being an entire sentence, and having that effect which the law will not admit, because the whole was before limited in use, therefore it shall be rejected; it is like the grant of an advowson excepting the presentation for the life of the grantor, which is wholly void; but it is not like a lease of a house, excepting a chamber *to and for the proper use of the lessor*, because those are words which give the lessor an authority to dispose of the chamber at his will and pleasure.

1 Vent. 87, 78, 106. Raym. 207. 1 Lev. 287. See 1 And. 129. S. P. Exception where it shall be rejected. 2 Roll. 455.

EXCHANGE.

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1. ANONYMOUS.

PERMUTATIO vicina est empitoni, but exchanges were the original and natural way of commerce, precedent to buying, for there was no buying till money was invented; now, in exchanging, both parties are buyers and

sellers, and both equally warrant; and this is a *natural* rather than a *civil contract*, so by the *civil law*, upon a bare agreement to exchange, without a delivery on both sides, neither of the parties could have an action upon such agreement, as they may in cases of selling; but if there was a delivery on one side, and not of the other, in such case the deliverer might have an action to recover the thing which he delivered, but he could have no action to enforce the other to deliver what he agreed to deliver, and which the deliverer was to have *in lieu* of that thing which he delivered to the other.

Where the word exchange is necessary in the conveyance. Co. Lit. 50. b.

*2. In exchanges of land the word exchange is necessary in the conveyance, because it imports a special warranty in respect of the mutual consideration of the lands exchanged; it is likewise necessary, that the estates of both [*158] parties be equal in title, as if one hath an estate in fee, the other must have the like estate; but it is not necessary that their estates should be equal in value.

Cro. Eliz. 903. Yel. 8. Moor 665. 4 Rep. 121. Bustard's case.

3. Adjudged, that if *G. D.* exchange five acres with *W. N.*, and afterwards the said *W. N.* is evicted of one of those five acres which he had in exchange, the whole is defeated, and *W. N.* may enter on his own again; *& sic e converso*, if *G. D.* be evicted of one of his five acres.

EXECUTION.

Sid. 107.

1. THE plaintiff may take out execution against the *bail*, and if they pay part of the money, he may discharge them, and take execution against the *principal* for the rest, but he cannot proceed against the *principal* till the bail are discharged (*a*).

Mod. 312. Vent. 329.

2. Judgment against four *defendants*; if afterwards three surrender themselves, the bail is still liable; but if the plaintiff take three in execution, the bail are not liable, because in such case *they cannot bring them in*.

(*a*) In *Com. Dig. Execution*, H., the same authority is referred to, as follows: If he takes execution against the bail, and has satisfaction, he shall not afterwards have execution against the principal; otherwise, if he has not had satisfaction against the bail, for then he may refer to the principal.

3. Upon a *fi. fa.* the defendant may pay the money to the sheriff, and may plead, that it was levied; but if he be in *execution* he cannot pay it to the sheriff and plead it to a new *action of debt*, neither can he pay it to the sheriff if he is taken upon a *ca. sa.*, because he hath no authority to receive it.

2 Jones 97.

4. The plaintiff obtained a judgment for 2000*l.* and brought an *elegit*, and levied 400*l.*; he cannot have any other execution, but he may have an *action of debt upon the judgment* for the residue of the debt, because it is not satisfied, and the *elegit* is only by the statute as a farther remedy; and in the principal case, the extent being only of a term for years, the *elegit* was executed but as a *fieri facias.*

Sid. 184. 1 Lev. 92.

*5. Where *goods* are taken in execution, the property of the first owner ceases by the seisure.

1 Vent. 53.

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6. If a *prisoner* escapes, who was in *execution*, his creditor may re-take him by a *ca. sa.*, or bring an action of debt on the judgment, or a *scire facias* against him, for he hath still an interest in the body, as a pledge for the debt.

1 Vent. 269.

7. Where a *fi. fa.* is delivered to the sheriff to levy 20*l.*, and he takes an entire thing in execution, (*viz.*) a horse worth 30*l.*, and sells it for so much, and returns, that he levied the 20*l.*, he may retain the other 10*l.* till the defendant demands it, for he (the sheriff) is not bound to look after the defendant; but if on a *fi. fa. for* 20*l.* he levy *five oxen*, worth each of them 5*l.*, and sell them for so much, the defendant may have an action of trespass against the sheriff.

Noy 59.

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8. SMALLCOMB *v.* BUCKINGHAM.

[1 Ld. Raym. 251. S. C. Comyns 35. S. C.]

IN this case it was held, That at common law, all the lands were bound which the party had at the time of the judgment given against him, and the judgment always related to the first day of the term; but now, by the statute 29 *Car.* 2. the judgment binds the lands (as to purchasers) from the time *it was signed.*

1 Salk. 320. Judgment binds from the time it was signed.

So at common law, the *goods* were bound from the *teste of the execution*, though that might be antedated, and if the defendant sold the goods after the *teste*, or died, the sheriff might levy them; but now, by the aforesaid statute, they are only bound *from the delivery of the writ of execution* to the sheriff, but not absolutely bound in all cases; for if after the delivery of the writ, and before execution executed, the defendant becomes bankrupt, that will hinder the execution.

The goods are bound from the delivery of the writ of execution to the sheriff, and not from the teste.

9. ANONYMOUS.

Where there needs no liberate on an extent.
2 Rol. Ab. 475.

RULED, That where an *extent* is upon a *statute-merchant* there needs no *liberate*, for the sheriff may deliver all in execution without it; but where an *extent* is upon a *statute-staple*, or upon a *recognizance*, there must be a return made of such an extent, and then a *liberate*, before there can be a delivery in execution; it is for this reason, that a *statute-merchant* is said to include a *liberate*, and that the sheriff before the * *liberate* upon the extent, may take his fees, but not where the extent is upon a *recognizance*.

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* Hutt. 53.

10. ANONYMOUS.

Where a sheriff may be a trespasser, but the execution is good.

WHERE judgment is given against one, who is in view of the court, or in *Westminster-hall*, it may be executed immediately, and the party taken or sent for into court and committed; and it was said, that if a sheriff execute process in *another county*, it is erroneous and void; so if he execute it in a *county palatine;* but if he execute it within a *franchise* in a county, or in the *Isle of Ely*, it is good, for being but a *liberty*, it is still part of the *county;* and though the sheriff may be a trespasser, yet the execution shall stand good.

EXECUTOR.

2 Lev. 26. Ventr. 175. Bac. Abr. Exec. N.

1. COVENANT with the feoffee, his *heirs and assignees*, that they should *quietly enjoy;* the feoffee was *evicted* and died. Adjudged, that his *executor* may bring an action of covenant, for the eviction being made to the *testator*, he could not have an *heir* or an *assignee* to this land; but his executor represents his person, who was damnified by the breach of this covenant.

2 Lev. 145.

2. Debt against *husband and wife*, in which the plaintiff declared upon a *devastavit* against both of them; and, upon a demurrer to this declaration, it was held ill, be-

cause a *feme covert* cannot commit waste; though if she survives her husband, she shall be chargeable for waste done by him.

Vide Str. 440.

3. An executor may bring trespass, *quare blada crescentia in vita testatoris messuit & asportavit;* for corn standing is a *chattel*, and the mowing and carrying it away, was one entire act; but if the cutting was at one time, and the carrying away at another time, then they are distinct acts, and he must sue for the carrying away only.

1 Vent. 187.

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4. But an executor cannot bring trespass *quare herbam crescentem in vita testatoris messuit & asportavit*, because grass *growing* is part of the *freehold*, and not a chattel.

5. An executor having *assets*, may be compelled to *redeem a mortgage*, for the benefit of the *heir at law;* he shall be likewise compelled to pay a debt for which the *heir* was liable.

Hardr. 512. Vide Cope v. Cope, 2 Salk. 449. and note thereto.

6. In *debt for rent* against an executor, though it is brought in the *detinet*, and the term expired, he cannot plead a *bond* of the testator yet unsatisfied, because the *debt for rent* is of as high a nature as the debt upon the *bond:* The defendant cannot wage his law in either action, and a bond given for the rent would not extinguish the action of debt, which arises upon the first contract.

2 Vent. 184. 12 Mod. 7. 1 Vern. 490.

7. WHITEHALL *v.* SQUIRE.

[Pasch. 2 Annæ.]

THE case was: A man possessed of a horse put it to pasture to the defendant, and died intestate; *W. R.* desired the defendant to bury him, and agreed that he should have the horse for his charges, *&c.* accordingly the defendant buried him, and laid out more money than the horse was worth; afterwards *W. R.* took out *administration*, and now brought an action of trover for the horse: Two judges were of opinion, that the action would not lie, because the plaintiff consented and agreed that the defendant should have the horse. But *Holt*, Ch. Just. held, that the action would lie, because the defendant was an *executor de son tort;* it is true, such an executor is only liable in respect to the *value* he hath received, and when he hath paid to that value, he is no farther liable *as to creditors;* but as to the *executors*, or to a *lawful administrator*, he is still liable in respect of the *tort*, in meddling with what by law belonged to them, and they may bring trover against him; yet evidence being given of what he justly paid, he may be recouped.

1 Salk. 295. Administrator cannot bring trover for any thing taken by his own consent before administration granted. 3 Mod. 276. S. C.

8. THE KING v. SIR RICHARD RAINES.

[Mich. 12 Will. 3. B. R.]

1 Salk. 299. Mandamus to admit an executor to prove a will.

MANDAMUS to admit an executor to prove the will of his testator; the *Chancellor* returned, that true it was, the party was *executor*, but that he was only *executor in trust* for such children of the deceased, and that he was *very poor*, and absconded from his creditors, by reason whereof he (the Chancellor) refused to grant administration, until the party should give security to perform the will, *&c* It was urged to maintain this return, that there are three sorts of *executors*, (*viz.*) there is an *executor legitimus*, and that is the *ordinary himself;* there is an *executor datus*, and that is where one is appointed by the *ordinary* to administer, *&c.* and he always gives caution, *&c.* and there is *executor testamentarius*, and that is where one is appointed by the will of the testator; and that in this last case the ordinary may take security of him by *caution*, as well as they do by *oath*. But by *Holt*, Ch. Just. where a man is made executor, he cannot be sued to accompt but only in respect of creditors and legatees, for the residue is his own by the common law; and so it is of an administrator, because by the statute 31 *Ed.* 3. an administrator is put in the same state and condition with an executor; now, an executor being properly an officer, it is reasonable he should take a *promissory oath*, because this is of common right in all cases of officers; but it is not of common right to demand collateral security of them, and the ordinary cannot put terms upon him where the testator hath put none, neither can he pronounce him to be no executor, when the testator hath made him so.

9. WANKFORD v. WANKFORD.

1 Salk. 299. S.C. Where the obligee makes the obligor executor it is a release of the debt.

THIS case is reported in 1 *Salk.*, and it is much the longest in that book; but here it is only stated, and the argument of the *Ch. Justice Holt* exactly reported.

ss. The *obligor* married the *daughter* of the *obligee*, who afterwards made the *obligor executor*, who administered some part of the goods, and *before he proved the will* he himself made a will, and his wife executrix, and died, after whose death she proved the will of her late husband, the *obligor*, and took out *administration* to the *obligee cum testamento annex'*, and brought and action against the *heir of*

the obligor. The question was, Whether the *obligee making the obligor executor* was a *release* of the debt? and he held that it was.

(1.) Because the obligor is in such case to pay and receive, and where one and the same person is to do both those acts, the action is released, but the debt remains as *assets* in the hands of the obligor, and by making him executor, that amounts to a payment and release.

(2.) It is otherwise if he had no assets, because then there is no person *to pay*, but only to *receive*, so that it is the having *assets* that amounts to payment.

Plowd. 185. b.

(3.) If the *obligor administers to the obligee*, though there is *assets*, this is no extinguishment, and yet in that case the same person is both to pay and receive; the reason is, because an *administrator comes in by the act of the ordinary*, but an executor (as in the principal case) by the act of the party himself; but yet the *Chief Justice* held, that if an *administrator* shall, out of his own money, pay a debt of the intestate to the value of a bond debt, which he (the administrator) owed to the intestate, this would be a discharge of the bond.

8 Rep. 136. Sir John Needham's case.

(4.) Where the obligee dies, and his *executrix* marries the obligor, this is no extinguishment of the debt; but if a feme obligee marry the obligor, this would extinguish the debt; because it would be a vain thing for the husband to pay money to the wife in her own right; but he might pay it to her as executrix because there might be *administration de bonis non*, of that as well as other goods, and it might be kept by itself; and if the husband takes it, though it becomes his goods, yet it is a *devastavit*.

1 Leon. 320. Moor 236. 1 Inst. 264.

(5.) If the *obligee makes the obligor executor*, and he administers some part of the goods (as in the principal case) and dies before probate, the debt is discharged, and this amounts to a *release*, because by his administering he hath accepted to be executor, and becomes a complete executor, and cannot afterwards refuse or waive it; and he may, before *probate*, *receive*, *pay*, *release*, and maintain any possessory action, as *trover*, or *trespass*, for goods of his testator taken since his death; and he may, *before probate*, avow for rent due since the death of his testator, but not before, and the right of an *executor* is not like that of an *administrator*, which is derived from the ordinary, but it is entirely by virtue of the will, and the *probate* gives him no right, either to his office or to an action, for he may bring an action before *probate*, but an administrator cannot before letters of administration granted; it is true, he cannot proceed in such action before *probate*, it being convenient in other respects, but not to give him a right.

Plow. Com. 290. 1 Mod. 213.

(6.) Where an executor is made, and he never administers, he may refuse whether he will administer or

not: and thereupon an immediate administration shall be granted, (*viz.*) *de bonis W. R. intestati;* but if once he administers, he cannot afterwards refuse or waive the office, and administration cannot be committed to another during his life.

(7.) So likewise if he administers *and dies before probate*, an immediate administration, and not an *administration de bonis non* shall be granted, because he died *ante onus super se susceptum* in the ecclesiastical court.

(8.) Where an executor dies after he hath administered and *before probate*, and makes a will, and *W. R.* executor, such executor can never be executor to the first testator, because he can never prove his will, for he is not named in the will of the first testator, and *no person can prove his will but he who is named in the will;* but if the first executor had *proved* the will, then his executor would have been executor to the first testator, because the probate of the will would have been a continuance of the first executorship.

(9.) Where *several executors* are made, they may all refuse, but if one administers, the rest cannot refuse, but they must all *be named* in actions brought in the right of the testator, and notwithstanding such refusal, any of them may release a debt; and if the refusing executor survive those who acted, and administration is committed to another, it is void: But if such refusing executor come into court and refuse, in such case administration may be committed to another.

Upon the whole matter, the executor in the principal case having administered part of the goods, though that executorship was determined by his death, yet he being once executor by his administering, that operated as a release of the debt; and afterwards he dying *before probate*, his executor cannot be executor to the first testator so as to revive this debt.

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10. YEOMAN *v.* BRADSHAW.

Antea Bills of Exchange, 7.

ADJUDGED, That a *bill of exchange* shall be said to be *bona notabilia* where the debtor is, and not where the *bill is*, for it is no *specialty* in law; for if an executor pays debts upon simple contract, or suffers judgment to pass against him, in such actions he may plead such payment or judgment in bar to an action upon a *bill of exchange;* it is like an award in writing, which is no chattel where such *award lies;* for in pleading, it is never said *hic in curia prolat'*, which shews that it is no specialty.

FEES, FEUDS, & FEOFFMENTS.

1. *FEODA:* Feuds were originally at will, and then they were called *munera*, afterwards they were for life, and then they were called *beneficia:* and for that reason the livings of clergymen are so called at this day, and afterwards they were made hereditary, and then they were called *feoda*, and in our law *fee-simple.*

Rel. Spel. 9.

2. When *Hugh Capet* usurped the kingdom of *France*, about the year 947, to fortify and support himself in such usurpation, he granted to the nobility, *&c.*, that whereas till then they enjoyed their honours for life, or at will only, they should from thenceforth hold them to them and their heirs; which was imitated by *William, called the Conquerer*, upon his accession to the crown of *England*, for, till his reign *fees or feuds* were not *hereditary*, but for life only, or for some determinate time.

3. A *feoffment* was originally the grant of a feodal estate or feud; but now it is the grant of an estate of inheritance; and till feuds and tenures came in, charters and conveyances in fee-simple were made by these words, *dedi & concessi*, without the words *feoffavi.*

4. And until the statute *quia emptores terrarum*, the feoffments were always *tenendum* of the feoffor *per homagium & servitium*, but after that statute they were made *tenendum de capitalibus, dominis feodi, &c.*

But now the way of pleading a feoffment is thus, *viz.* That *W. R.* was seised in fee of the place where, *&c.*, and being so seised *feoffavit quendam W. W. inter alia per nomina omnium, &c. habend' & tenend' dict' tenementa, &c. præfat' W. W., & hæredibus suis in perpetuum ad solum opus & usum, &c.*

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5. PARSONS *v.* PETITT.

A SPECIAL verdict in ejectment found, that there were two joint-tenants in fee, one of them made livery within the view, *viz. go enter and take possession;* but before it was executed she married the feoffee himself; it was argued, that this feoffment was void, because there was no actual entry pursuant * to the livery, and that by the subsequent marriage the feoffee was seised in right of his

1 Mod. 91.
4 Co. 61. a.
2 Lev. 34.
2 Roll. 3 K.
Pollex. 50.
1 Vent. 186.
Livery in the view, where good.

[* 166]

wife, and now cannot by his entry work any prejudice to her right; but adjudged that he might enter at any time, for he had not only an authority so to do, but an interest passed by the livery in view, by which act the woman did all which was in her power to do.

FENCES. See Distress, 3.

1. POOL v. LONGVILL.

2 Saund. 289. Where the plaintiff's cattle escape into the defendant's close for want of repairing the fences, which the defendant ought to repair, they cannot be distrained for the defendant's rent unless levant and couchant.

IN replevin, &c. the defendant avowed the taking, &c. for rent arrear; the plaintiff replied in bar, that he the plaintiff was possessed of a close adjoining to the *locus in quo*, &c., and that the defendant, and all those whose estate he had time out of mind had made and repaired the fences, &c.; and that the fences were not repaired, but for want thereof his (the plaintiff's) cattle escaped out of his close into the *locus in quo*, &c.; and that the defendant took them before the plaintiff had any notice that they were there: And upon demurrer to this replication it was adjudged ill, which judgment was affirmed upon a writ of error in *B. R.*, the Court relying upon the year-book 10 *H.* 7. 21. *b.*; where it is held, that if cattle escape into another man's land, and the *lord distrain*, it is not material whether they were *levant and couchant*, for the distress is good; but the reporter tells us, that there is a difference where a lord distrains within his lordship, and where a lessor distrains for rent arrear, for as to the lord, it is not material whether the fences are in repair: but as to the lessor, if he is bound to repair the fences, he must take care his tenant shall do it: *Et per* * *Holt*, Ch. Just. It is fit this case should be better considered, for it will be hard to maintain it.

Bac. Abr. 109.

* Mod. Cases 198.

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2. THE KING v. THE INHABITANTS OF PENRITH.

[Pasch. 1 Will. 3. B. R.]

Inquisition for throwing down fences in the night time.

INQUISITION to the sheriff to inquire what malefactors threw down the hedges and fences of *Lancelot Simpson*, &c.; and upon a return thereof a * *distringas* was

* Cro. Car. 280,

awarded; it was objected, that there was not fifteen days between the *teste* and return of the original, and this was held to be a fault *per Curiam* (a). It was also objected, that a *distringas* ought not to be awarded upon the return of the inquisition, but a *scire facias* to shew cause, *&c.*; but adjudged, that a *scire facias* was not necessary; then it was objected, that it doth not appear that *Simpson* was lord of the manor, or had a right to these fences; but it was held, that need not be shewed, for if he had no right, that ought to be objected on the other side. And lastly, it was objected that the *vill* ought to have a *year and a day* to indict the malefactors; and it appears that this inquisition was taken within the year after the offence committed: Adjudged, that a year and a day is not necessary to be allowed, but a convenient time, and of that the Court may properly judge.

439, 580. Jones 307. Sid. 107. 212. Lut. 157. All inquisitions of this kind traversable. 2 Salk. 588.

1 Lut. 158. Cro. Car. 440.

Skinner's Rep. 94.

Distringas upon the statute *Westm.* 2. against the inhabitants of the next vills, for throwing down inclosures. Two of the inhabitants of each vill appear, and plead, that the inclosures were thrown down in the day-time, and not in the night. *Et per Curiam:* Whether they were thrown down in the day or night it is not material, for if the offenders were not known, it is within the statute, which gives the remedy where the offenders are not known; and where they are known, the party hath remedy by an action of trespass.

1 Lev. 106. Rex v. Inhabitants of Woodford. Not material whether thrown down by night or by day. Lut. 157. 2 Inst. 476. 1 Sid. 107. 212.

(a) *Co. Lit.* 134. b. 2 *Inst.* 567.

FINES.

[168]

1. ANONYMOUS.

[Hill. 12 Will. 3. B. R.]

PER Holt, Ch. Just. At common law fines were levied upon any original writ; as upon a *writ of entry*, *writ of right*, *&c.*, as well as upon a *writ of covenant*, and they might be levied for any thing for which a *præcipe quod reddat* or *permittat* lies; and they are leviable in *counties palatine*, by the statute 38 *H.* 8. *cap.* 19; and 2 and 3 *Ed.* 6. *cap.* 28.

2. CLEMENTS *v.* LANGHAM.

[Pasch. 2 Annæ, S. C. 2 Ld. Raym. 872.]

Where the cognisor died after the caption, and before the return of the writ of covenant.

ERROR of a fine levied in the court of *Common Pleas;* the error assigned was, that the cognisor *died* after the caption, and before the return of the writ of covenant, and for this reason it was reversed (*a*). *Sed, &c.*

Fine levied by an infant, who died before she was of age. 2 Vent. 30. 2 Lev. 36.

3. The husband prevailed with his wife, being about twenty years of age, to levy a fine of her inheritance; the wife *died*. *Et per Curiam*, if she had been living and under age, she might upon a motion be brought into court by an *habeas corpus*, and if by inspection she be found to be under age, the Court will set aside the fine, and punish the commissioners who took the caption; but at common law, there were no such abuses, because all fines were levied in court; but now since the statute 15 *Ed.* 2. which gives the *dedimus*, fines have often been levied by infants.

1 Vent. 143, 170. Cro. Jac. 120. Cro. Car. 269, 276.

4. A fine of all his lands in the *parish of Blandford*, shall pass all his lands in that parish, though in several *vills*, but not out of the *vills*, though in the parish, *&c.*

1 Ch. Rep. 278. 1 Freem. 311. Gilb. Ch. 62. Cruise 100.

5. A fine and nonclaim bars all trusts and equities, where the equity charges the land, but where it charges the person in respect of the land, it will not bar; also an equity of trust, created by a fine, shall never be destroyed or barred by the same fine.

(*a*) *R. ac. Barnes* 220. 2 *Wils.* 115. *Vide Cruise* 27.

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FORCIBLE ENTRY.

1. THE QUEEN *v.* GRIFFITH *& AL'.*

[Mich. 1 Annæ, B. R.]

Indictment quashed for not setting forth, that he was seised or disseised. 1 Hawk. ch. 64. sec. 38.

INDICTMENT for a forcible entry quashed, for not setting forth, that the party was *seised or disseised*, or what estate he had in the tenement; for if he had only a term for years, then the entry must be laid *into the free-*

hold of A. in the possession of W. R., and the restitution must be accordingly: The word *seisin* is a term of art in this case, it being upon the statute of *H.* 6.; but the case in **Popham* was upon the statute †21 *Jac.*

*Poph. 205.
†21 Jac. cap. 15.

2. ANONYMOUS.

AT common law, where the party had a right he might enter with force; but by the *statute* 15 *R.* 2. he is restrained from entering with *force*, though he hath a right to enter; neither can he enter peaceably, and hold out *manu forti per* 8 *H.* 6. *cap.* 5. nor enter *manu forti*, and hold out *manu forti*.

1 Hawk. ch. 64. Vide 3 Bur. 1732.

Now in these cases, a man may either proceed civilly or criminally; his civil remedy is by writ of forcible entry, wherein he shall recover treble damages and costs; and this is upon the statute *of H.* 6., and to this writ the defendant may plead not guilty, or he may plead any special matter, and traverse the force; and the plaintiff in his replication must answer the special matter, and not the traverse, for there shall be no inquiry of the force, if the special matter is found for the defendant, and if it is found against him, then he is convicted of the force of course.

St. 8 Hen. 6, 9. Co. Ent. 44. b. 315. b. Lut. 1548.

3. But the plaintiff can never recover in this action, unless he maintain his writ, (*viz.*) that the defendant *expulit & disseisivit eum;* therefore he must have some estate of *freehold* at least, and such an estate upon which the defendant could not lawfully enter, otherwise it can be no *disseisin*.

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4. But if *W. R.*, is seised, and *L. R.* having good right to enter, doth accordingly enter *manu forti*, he might be indicted notwithstanding his right, and restitution shall be awarded.

1 Hawk. c. 64. s. 34.

5. THE KING *v.* BENGOUGH.

[Trin. 11 Will. 3.]

INQUISITION for a forcible entry upon the possession of *Lanton*, was taken upon *view by one justice* of peace, and restitution awarded; and now the attorney-general moved for re-restitution upon an *affidavit* made, that when the force was found, the defendant tendered a *traverse* of not guilty to the inquisition, which the justice of peace refused to accept; and *per Curiam*, (except *Gould*, Justice,) the justice of peace should have accepted the *traverse*, for the fact was traversable, and that the law

Upon an inquisition taken upon the view by one justice, he cannot deny a traverse of the four.

Cro. Eliz. 31. 1 Haw. c. 64. s. 64.

*Dyer 122, 359, 360.

was taken to be so in this court during all the time the *Ch. Justice Keeling* sat here: It is true, *in* **Styles* it is said, that upon an indictment at sessions, the justices may accept a traverse, but that a justice of peace, upon an inquisition of a force taken upon his view, cannot accept a traverse, because it is a sort of judgment upon his view; but the law is taken to be otherwise.

1 Vent. 108. 1 Hawk. c. 64. s. 38.

6. The indictment was, that *W. R.* being *seised and possessed, &c.* the defendant entered; this was adjudged ill for the uncertainty.

1 Vent. 306.

7. So it is where the indictment was, that *W. W.* entered and *disseised him;* for though a *disseisin* may imply a *freehold*, yet it ought to be expressed.

1 Roll. Rep. 406.

8. Indictment, *&c.* reciting the statute 8 *H.* 6. to be (*viz.*) If any one be expelled *vel disseised*, this was adjudged ill; for the statute is *si aliquis expulsus & disseisitus*, in the *copulative*, and not in the *disjunctive*, so the person must be both expelled and disseised.

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FORGERY.

1. THE QUEEN *v.* GODDARD & *AL'.*

[Trin. 2 Annæ. 2 Ld. Raym. 920. S. C.]

1 Salk. 342. Indictment for forgery not good.

THERE is a short note of this case in 1 *Salk.* but the case was as followeth: *ss.* It was an indictment for forging an assignment of a lease; the indictment was, (*viz.*) *Juratores, &c. super sacramentum suum presentant quod cum testatum existit per quandam indenturam quod W. R. dimisisset & concessisset & per eandem indenturam dimisit & concessit, &c.* The defendant *falso fabricavit quandem assignationem sive scriptum vel indorsamentum in scriptis, tenor cujus quidem assignationis sequitur;* and then it sets forth the assignment, *in hæc verba;* and at the bottom there was the *mark of the assignor*, for he could not write his name; but no mark appeared upon the *postea: Et per Curiam*, the **quod cum* is well enough, for it is but an inducement to the fact; and when the indictment comes to charge the forgery, it charges it in a particular manner; it is true, it is otherwise in an action of trespass, for

*Postea Indictment 6.

there *quod cum* is only recital and no positive charge: *Et per Holt* and *Powis*, the words *per eandem indenturam concessit* were a positive averment of a lease, and had no relation to the *testatum existit;* but *Powell* and *Gould*, *contra:* And, *per totam Curiam*, the want of the *mark* of the defendant upon the *postea* was a fatal defect, for by the statute of frauds, *&c.* a lease is not assignable without a writing signed by the party: But, *per Holt*, Ch. Just. if the indictment had been for *forging a deed of assignment*, and the fact had been set forth without any mark or signing, that might have been good, because *signing* is not necessary to a deed, for in former times they were only sealed and not signed (*a*); but now, since the statute of frauds, *&c.* an assignment by writing, if it is no deed, yet it must be signed; and this being no more, it ought to have been signed, otherwise it is no assignment: And now the Court being informed, that there was a new indictment found against the defendant, they would not give judgment upon these exceptions, but ruled the defendant should plead to the *signing:* And *per Holt*, Ch. Just. the defendant cannot plead over in any case but in treason and felony; and being found guilty, he could not plead the other indictment pending in abatement (*b*), but must plead *auterfoits convict.* [172]

(*a*) *Vide* 2 *Bl. Com.* 306. (*b*) *R. ac. Doug.* 240.

2. THE QUEEN *v.* BROWN.

Mod. Cases 87. Indictment for forgery of a cocket for five packs of cloth, good. * 1 Lev. 303. 2 Lev. 125. Vide 3 Ld. Raym. 991. Q. If not S. C.?

INDICTMENT for forging a cocket *pro quinq. sarcinis lini*, *Anglice*, five packs of linen cloth; and being found guilty, it was moved in arrest of judgment, that the indictment was ill, because it was uncertain how much cloth there was in those packs; but adjudged, that it is sufficient to describe the thing in which it is contained; as for instance, * *duas sarcinas canapis*, *Anglice*, two bundles of hemp.

3. THE KING *v.* MARSH.

Information for forgery compounded.

ONE *Marsh* was found guilty of *murder* upon the coroner's inquest, and afterwards the coroner inserted the names of two other persons as found guilty by the same inquest, who, together with the said *Marsh*, were indicted upon the said inquest, which being tried at bar, they were all acquitted; afterwards two of the jury of the coroner's inquest made oath, that they found the indictment only against *Marsh*, and that the coroner took the indictment,

it being in *English*, and told them he must ingross it in *Latin*, which was done, and then he inserted the names of the other two persons, whereupon an information was brought against him for a forgery, which was tried at bar, and he was found guilty; but, having compounded with the prosecutor, was fined only twenty nobles.

4. WATTS'S *CASE.*

Hardres 331. Who shall not be a witness to an information for a forgery. 2 Str. 728. Bull. N. P. 288. 2 Hawk. c. 46. s. 24., and notes to the 6th edition thereof.

INFORMATION against the defendant for forgery, and for publishing a forged deed, knowing it to be forged: Adjudged, upon a conference with the judges of *B. R.* to whom one of the barons of the Exchequer was sent, that no person who is or may be a loser by the deed, or who may receive any benefit or advantage by the verdict being found against the defendant, shall be a witness.

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FOREIGN PLEA.

1. CHOLMLY *v.* BROOM.

[Pasch. 9 Will. 3. B. R.]

5 Mod. 335.

Vide st. 4 & 5 Ann. ch. 16.

DEBT against the defendant *in custodia marescalli*, upon a bond sealed and delivered at *Chester:* The defendant pleaded, that he was an inhabitant in *Chester*, and, at the time of the action brought, lived in *Chester*, *&c.* The plaintiff taking this to be a foreign plea, and therefore ought to be sworn, which not being done, he entered judgment: But it was set aside; for, *per Curiam*, a plea to the jurisdiction is no *foreign plea*, nor a plea of *privilege*, nor of *ancient demesne*, which pleas are never sworn: A foreign plea is where the defendant by his plea would remove the cause of action out of the county where the plaintiff had laid it; but it is no foreign plea where the defendant agrees the place and county as the plaintiff had laid it.

2. SPARKS *v.* WOOD.

IN an action of debt in *London*, the defendant moved for a prohibition, suggesting, that he tendered a plea in the inferior court, that the cause of action did not arise within the jurisdiction of that court, and offered to make oath of it, and now would have made *affidavit* of the truth of the fact, and of his plea in *B. R.* *Sed per Curiam:* Oath ought to be made of the truth of the plea in that very court whose jurisdiction is denied; and, it appearing that he tendered such oath after the Court was up, this prohibition was denied, for it ought to be done *sedente Curia*, and *in propria persona*.

6 Mod. Case 146. In what court oath ought to be made. 1 Ven. 180, 333. Lutw. 1026, 1567, 1571. 2 Mod. 273.

1 Mod. 81. Post. 287.

FRAUD AND COVIN. [174]

1. BY the statute 13 *Eliz. cap.* 3. all fraudulent conveyances as to creditors are made void; and by the statute 27 *Eliz. cap.* 4. they are made void as to *purchasers*.

2. Now, upon the first of these statutes, if a man gives his goods to his son, yet they are still liable as to his creditors; but if he gives them to one of his creditors *bona fide*, without any trust or covin, they shall not be liable to other creditors.

2 Roll. Ab. 779. Pal. 214. 2 Bac. Ab. 604.

3. So if a man is *indicted* and gives away his goods to prevent a forfeiture, the king shall have them upon an attainder or conviction; otherwise if he sell them to one for a valuable consideration, who had no notice of the *indictment*.

4. If tenant for life commit a forfeiture, so that by the entry of him in the reversion his creditors may be defeated, this is a fraudulent conveyance as to them.

1 Vent. 257.

5. Upon the statute 27 *Eliz.*, if a man levy a fine to the use of himself for life, remainder to his son in tail, and afterwards sells the fee-simple to *W. R.*, he, as a purchaser, shall avoid this conveyance, because it was *voluntary*, and therefore fraudulent; so it had been if he had settled the remainder on his wife, unless there had been a consideration or precedent marriage.

Sid. 133. Moore 615.

Prec. Ch. 275. 520.

6. The father made a lease for twenty-one years, in trust for his daughter till marriage; and if she married with his consent, then to her during the term; this till marriage is fraudulent as to a purchaser, but after marriage it is good, because marriage is an advancement to the daughter, and the husband was drawn in by this conveyance to marry her.

2 Lev. 148. Prec. in Ch. 426. Bull. N. P. 261. Prec. in Ch. 113.

7. The husband was a tradesman, and his wife was an inheritrix, and he promised her, that if she would join with him in a sale of her land, and let him have the money to pay his debts, that he would leave her 400*l.*: About six months after the lands were sold, he gave bond to *W. R.* to leave his wife 400*l.*; adjudged, this is not fraudulent, but good against creditors.

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GAMING.

1. SMITH *v.* ARY,

[Hill. 2 Annæ, 2 Ld. Ray. 1034. S. C.]

Mod. Cases 128. Indebitatus assumpsit will not lie upon mutual premises. Ante 14.

INDEBITATUS assumpsit, in which the plaintiff declared, that in consideration he had promised the defendant to play and to pay what he lost; the defendant promised to play, and to pay the plaintiff what he (the defendant) lost; *cumq. etiam*, that he (the plaintiff) had won so much money *ad ludum prædict'*, the defendant *in consideratione inde* promised to pay it: The Court agreed, that here were mutual promises laid in the first count, but that an * *indebitatus* would not lie upon those promises; it is true, it was insisted for the plaintiff, that the mutual promises in the first count must be understood, as if repeated in the second, because the play was upon the same agreement, and the money was alleged to be won *ad ludum prædict'*. But *per Curiam*, the second count is not the better for the first, for they are separate and distinct from one another, so that the agreement laid in the one will not go to the other; and if so, then there is nothing to support this action but the mutual promises, and debt will not lie upon a promise, and consequently an *indebitatus* will not; for there must be a consideration, or a *quid pro quo* to support it.

* 2 Vent. 175. 3 Lev. 118. contra. 5 Mod. 13. 1 Lut. Whityear v. Chancy; Moor 776.

2. ROSTINGTON'S *CASE.*

[1 Ld. Raym. 89. S. C. cited by the name Rosindale.]

ONE covenanted that his horse should run four heats with the horse of *W. R.* for 30*l.* each heat, which in all amounts to 120*l.*; adjudged, that though he win every heat, he can recover no part of the money, for though they were distinct wagers, yet the contract was entire.

1 Vent. 253. 2 Lev. 92. 3 Keb. 254. Though the wagers are distinct, the contract is entire. Vide Bl. 1226.

3. EGGLETON *v.* LEWIN.

INDEBITATUS assumpsit for 20*l.* won at cards, there was judgment by default, and a writ of inquiry executed, *&c.*; and, upon a writ of error in the Exchequer Chamber, the error assigned * was, that a general *indebitatus assumpsit* would not lie for money won at play; and the greater number of the judges inclined, that it would; but *per Holt*, Ch. Just., and *Pollexfen*, Ch. Justice of *C. B.*, that it would not, because there must be some meritorious act, as a consideration to maintain such action; it will lie against him who holds the wager, because the law implies a promise to deliver the money to the winner.

Indebitatus assumpsit lies for money won at play, &c Vide 1 Salk. 23. 1 Ld. Raym. 69.

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GUARDIAN (*a*).

1. A GUARDIAN is either *legitimus*, *testamentarius*, *datus*, or *custumarius*.

2. He who is a *lawful guardian* is so either *jure communi*, or *jure naturali*; the first as guardian in *chivalry*, who is so either in fact or in right; the other *de jure naturali*, as father or mother.

3. A *testamentary guardian* by common law, for the body of the pupil, was to remain with him who was appointed by the testator, till the *age of* 14; but as for his goods it might be longer, or as long as the testator appointed; and as to this matter there are several † statutes, which you may see in the margin.

† 32 H. 8. 34 H. 8. 4 & 5 Ph. & Mar. 12 Car. 2.

(*a*) See this subject very fully discussed in *Harg. Co. Lit.* 88. *b. n.* 7.

4. *Guardianus datus*, by the father in his life-time, or by *Lord Chancellor* after the death of the father.

5. And, lastly, there is a guardian by custom, as of *orphans* by the *custom of London* and other cities and boroughs.

6. By the *civil law*, *id quod a tutoribus arrogatur potius justitia quam aliena authoritate firmatur*, therefore the guardian is to *educate* his pupil *pro facultate patrimonii & dignitate natalium;* and this word *education* comprehends *food*, *raiment*, *lodging*, *physic*, and *schooling*.

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7. He shall answer for what is lost by his *fraud*, *fault*, *negligence*, or *omission*, but not for any casual events, as where a thing had been well but for such an accident.

8. He ought to sell all moveables in a reasonable time, and turn them into land or money, especially if they were *bona peritura*, for those yield no profit; yet in some cases this rule may fail, as where the pupil is near being of age, and may want such goods.

9. He shall pay *interest for money* in his hands, which he might have put out at interest, for in such case he shall be presumed to make use of it himself.

10. If 600*l.* is due and in arrear from the infant's estate, and the guardian compounds it for 100*l.*, the infant shall have the benefit of such composition, and not the guardian.

Where a father devises his child to a guardian, the Chancery cannot interpose. 2 Ch. Rep. 237.

11. Now, as to *guardianus datus*, this case happened; the father devised the tuition of his son, being *seven years of age*, to his mother-in-law, and died; afterwards the widow married her servant, and, being poor, the uncle gets the possession of the infant, and sends him beyond sea, but the *Lord Chancellor* ordered him to send for, and restore the infant; for, where there is a guardianship by the common law, this Court can order and intermeddle; but where by statute, as in this case, the Court cannot remove either the child or guardian; but we can and will make him give security not to marry the infant without the Court is first acquainted with it.

Vide 1 P. Wms. 698. 2 P. Wms. 112.

Hot. 16. Hob. 215. Lutw. 1186.

12. And as to a *guardian by custom*, as in copyhold manors; if the copyholder has a son within age, and die, the guardianship doth *de jure* belong to the next of kin, to whom the lands cannot descend; but by custom it may belong to the *lord of the manor*, either to be *guardian* himself, or to appoint one.

3 Lev. 395. 2 Lutw. 1182. * Cap. 24.

13. The father in a copyhold manor, and being a copyholder himself, cannot, by virtue of the statute * 22 *Car.* 2. appoint a guardian for his son; for there may be a custom to the contrary, and to alter that custom may be prejudicial to the lord of the manor.

2 Lev. 162.

14. Where an *infant* has only a *personal estate*, the Ecclesiastical Court may appoint a curator or guardian as

to that, and may take security of such curator by bond, for due performance of his trust; but it hath been a question, Whether such bond shall be taken in the name of the ordinary and commissary, or in the name of the ordinary only?

15. BRIDGET HIDE'S *CASE*.

BRIDGET Hide, being the daughter and heir of Sir *Thomas Hide*, and about thirteen years old, and her mother having married Sir *Robert Viner*, and she being dead, the Court was moved for a *habeas corpus* to be directed to Sir *Robert Viner*, in whose custody she was left, and who had no right to her, so that her aunt was guardian at law; and she being brought into court, it was suggested, that he intended to marry her to a great person, but of small fortune, though she was already married to one Mr. *Emmerton*, by the consent of her mother whilst living; which marriage being questioned, and the young child being asked by the Court, Whether she was willing to stay with her father-in-law? she answered, that she was; whereupon he was ordered to enter into a recognizance of 40,000*l.* not to let her marry whilst she was in his custody, and to permit her aunt to visit her.

2 Lev. 128. An infant being in the custody of her father-in-law, the Court ordered him to enter into a recognizance not to suffer her to marry, &c. 1 Vez. 157, 313. 3 Atk. 304.

HEIR.

1. KILLOW *v.* ROWDEN.

[Hill. 8 Will. 2. B. R.]

DEBT against the defendant as heir to his father, without shewing *how he was heir;* upon *riens per descent* pleaded, the jury find that *John Rowden*, the father, being seised in fee, entered into this bond for which the suit was now brought, and afterwards he settled his lands to the use of himself for life, remainder to his *eldest son in tail*, remainder to his own right heirs, and died; after whose death the eldest son entered and died, leaving issue

Carth. 128. Sho. 248. 3 Lev. 288. 3 Mod. 253. Debt brought against an heir, without shewing how heir, good.

a son who also died without issue, so that the reversion (after the estate-tail *being spent) came to the second son of the obligor, who was now defendant; and the question was, Whether he had the estate by *immediate descent* from him, or from his nephew, who was the only son of his elder brother? *Et per Curiam;* Neither the elder brother or his son were ever seised of the reversion, for they were seised of an estate-tail, and not of the reversion expectant upon the determination of that estate; and if a *formedon* had been brought against the defendant, he should not, in making his title, have mentioned either his *elder brother or nephew; and yet they were seised of the reversion to some purposes, (*viz.*) *to give*, *to forfeit*, *to be in ward*, and to join the *mise* upon the mere right.

*1 Inst. 14. b. Dyer 308. b. 1 Cro. 412.

2. In debt against the heir upon the bond of his ancestor, he cannot plead that *W. R.* is executor, and hath assets sufficient to pay the debt, because the plaintiff ought to have the benefit of his security, and by consequence his election to charge either heir or executor; but in such case the heir by a bill in equity against the executor shall be relieved.

3 Lev. 189, 303, 304. Hard. 512. Where an heir shall be relieved against an executor in respect of assets. Plowd. 439. B. Dyer 204. b. 1 And. 7.

3. Adjudged, that the *heir* is never bound without an *express lien and assets*, and even then no longer than he hath *assets*, for he is not bound to keep them till he is charged; but if he hath *assets* he ought to plead truly and to confess them, otherwise a judgment general shall be given against him *de terris propriis*, for it is now his debt.

Jones 88. Heir bound no longer than he hath assets. Vide Plowd. 440. Palm. 419. 3 & 4 W & M. c. 14.

4. REDSHAW *v.* HESTHER.

[Comberb. 334. S. C. Carth. 353. S. C.]

DEBT against the defendant as heir upon a bond of his ancestor; upon *riens per descent* pleaded, the plaintiff replied, that he had lands by descent (*a*) *ante exhibitionem billæ, unde de debito prædict' satisfecisse potuit, & petit judicium Curiæ;* and upon a demurrer to this replication it was objected, that the plaintiff ought to have concluded to the country; besides, the replication is ill at common law, because it is, that the defendant had lands by descent *ante exhibitionem billæ*, which may be true, and yet he might have none at the time of the bill exhibited; it is likewise ill by the *statute, for that directs, that *where the heir sells any lands which were liable to the debts of his ancestor, before any action brought against the heir, he shall be answerable for the value of the land so sold*, which *value* should be tried by a jury, who, upon finding that such

5 Mod. 122. Debt against an heir, good.

*3 & 4 Will. 3.

(*a*) [After the death of his father, and before the bill exhibited.] Comber. 344.

lands descended, are *ex officio* to inquire of the *value*: therefore the replication should be, that the defendant had lands by descent, before, or at the time of the original writ, *&c.* without alleging *unde de debito satisfecisse potuit*, and then concluding *unde petit judicium, &c.*; because it is making the *value* of part of his replication, and putting it upon the judgment of the Court, when it ought to have been tried by a jury: *Sed per Curiam*, the replication is good, for though a jury may find, that what descended to the heir is not sufficient to satisfy the debt, and so may falsify the value alleged in the replication, yet the plaintiff shall recover to the value of the land sold, be it what it will.

5. OSBASTON *v.* STANHOPE.

DEBT against an heir upon a bond of his ancestor; the defendant pleaded, that he had nothing by descent *præter* the reversion expectant after the determination of a lease for years; the plaintiff replied, that he (the defendant) had sufficient assets by descent; and upon a demurrer it was objected, that this general replication was ill, for that the plaintiff ought to have answered the *præter*: *Sed per Curiam*, the *præter* is immaterial, because the reversion which follows is not chargeable, for the ancestor had settled the lands upon trustees to the use of himself for life, remainder to the *heirs males of his body*, remainder to his own right heirs, with power for the trustees to make leases, so that it was a lease made by them, and if the reversion should happen before the estate-tail spent, he had still but a reversion after an estate-tail.

3 Lev. 287. 2 Mod. 50. q. v. Debt against an heir, who pleaded, that he had nothing by descent præter reversionem, not good.

1 Roll. 269. Dan. 577. 6 Co. 42. Carth. 129

HERIOT. *See* Suit of Court, 3. [181]

1. SMARTLE *v.* PENHALLOW.

[Hill. 1701. B. R. 2 Ld. Raym. 994. S. C.]

IN a special verdict in ejectment, the case was: The custom of a manor was, that a copyholder might surrender for three lives *successive*, and that an *heriot* was due on the death of every tenant; a copyholder surrendered to *W. R.* for his own life, and for the lives of *A. B.* and *C. D.*; and

Mod. Cases 63. 1 Salk. 188. Custom, that a copyholder might surrender for three lives successive, and

that an heriot was due upon the death of every tenant.

the question was, Whether this was warranted by the custom? And adjudged that it was; and that it was no inconvenience to the lord of the manor, for there could be no occupancy: But *Powell*, Justice, doubted, because of the statute of bankrupts: *Sed per Holt*, Ch. Just. The statute makes no difference; for if the copyholder becomes bankrupt, and his estate is assigned by the commissioners, the assignee would have it determinable upon the life of the copyholder bankrupt, and that the heriot would be then due, but not upon the death of the assignee, because it was so originally, and cannot be altered by the act of the copyholder himself.

2. OSBORNE *v.* STURE.

2 Lev. 2 Lutw. 1366. 2 Saund. 267. 3 Mod. 230. Heriot-service, where to be paid.

IN trespass, the case was: A lease was made to *Dorothy Edgcomb* for ninety-nine years, if she and *Margery Upton* should so long live, under yearly rent of 20*s.*; and also after the decease of the said *Dorothy* and *Margery* (her or their best beast in the name of a *heriot*); that the plaintiff *Osborne* married *Dorothy Edgcomb*, and in right of his wife was possessed; and that she and the said *Margery Upton* were dead; and that the defendant took the gelding for an heriot after the death of *Margery*, *&c.*; and upon a special demurrer it was objected, that an heriot ought not to be paid, for this being an *heriot-service* reserved on a lease, is of the same nature with all other services reserved on [182] leases, and that is to be paid whilst the lease is in being; but here it was determined by the death of *Margery*, and there was no reversion in the defendant at that time: Two judges were of that opinion, but two more held, that the defendant had a reversionary interest in that instant of time that *Margery* died, and that the seizing the gelding shall relate to that time.

HIGHWAYS.

What is a highway, and what a private way. 1 Hawk. 476. s. 1.

1. ADJUDGED, That where a way leads to a *market-town*, or communicates with a great road, it is a *highway*; but if it leads to a *church*, or to a *vill*, or to a particular

house, it is a *private way;* and in a highway, which is called *Via Regia*, the king hath only the passage for himself and the people; for the freehold of the soil is in the lord of the manor, or in the owner of the land on each side; and if there are trees and other profits there, they belong to him.

2. Now, as to *reparation* of each, a *private way* is to be repaired of common right by that *vill* or *hamlet*, where it lies, but a *public highway* is to be repaired by the *whole parish*, unless some private person is bound to do it, either by *prescription*, *tenure*, or *encroachment*.

Who are to repair highways and private ways. 1 Hawk. ch. 76. s. 5.

3. But *lessee for years* cannot be charged *ratione tenuræ* (*a*), because that goes with the inheritance, [*and the tertenants are obliged*, Salk. 336.]

Lessee for years cannot be charged ratione tenuræ.

4. Where a *highway* lies over an open field, and the owner of the field turns the way to another part of the field for his own convenience, or encloses the field for his own benefit, and leaves a sufficient way besides, he is bound to repair and maintain that way at his own charge, and he must make it passable, though it was foundrous before; and if the way is not sufficient, any passenger may break down the enclosure and go over the land, and justify it till a sufficient way is made, and in this case the jury are only to inquire if it is the ancient way, if it is enclosed for the profit of the owner of the soil, and if it is foundrous; and it being proved that it was impossible to make the way because of the soil: *Per Curiam*, *lex neminem and impossibilia;* but in this case the defendant had bound himself to make the way good by enclosing the field; and that if he would take away the enclosure the charge would fall upon the parish. *Et per Curiam*, though he hath made the way as good as it is capable of being made, he shall not give that in evidence in discharge of the information, but he may give it in evidence in mitigation of the fine.

Cro. Car. 306. Where a highway is turned to another place, he who turns it must keep it in good repair. Vide 1 Bur. 465.

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5. *Information* against a *common carrier*, setting forth, that no *waggon* ought to carry more than 2000 weight; and that the defendant used a waggon with four wheels, & *cum inusitato numero equorum*, in which he carried 3000 or 4000 weight at one time, by which he spoiled the highway leading from *Oxford to London*, (*viz.*) *at Lobb-lane*, *in the parish of Hosely;* this was adjudged good, though it was laid generally at *Lobb-lane*, without shewing *how many perches in length;* because the nuisance was alleged, for all the way leading from *Oxford to London*, and *Lobb-lane* was mentioned only for the *venue;* and though there was no particular measure expressed how much of the way was spoiled, it shall be intended all *Lobb-lane* was spoiled; likewise, though it said that he went *inusitato numero equo-*

Mich. 17 Car. Egerly's case. Information against a common carrier, for overloading his waggon. Sayer 98.

(*a*) *Quære*, If it should not be *ratione* PRESCRIPTIONIS? *Vide 7 Mod.* 55., where it is held, tenant for years may be charged *ratione tenuræ.*

rum, without setting forth what number, yet the information is good, because it was the excessive weight which he carried that made the *nuisance*.

Noy 90. Latch. 182. 2 Leon. pl. 13. Indictment for stopping a highway, good. Vide 4 Bur. 2091. Str. 44. Lucas 383. 1 Hawk. ch. 27. s. 86.

6. The defendant was indicted for stopping the *king's highway* in *Kensington*, without setting forth any boundaries or abuttals in the way, leading from such a town to such a town, yet adjudged good; for a highway shall be intended to go throughout the kingdom; but it is otherwise, if the indictment had been for stopping a *private way*.

Raym. 215. The defendant may be admitted to a fine after a verdict on a certificate that the way is repaired.

7. Upon an indictment for stopping a *highway*, the course of the Court is, that the defendant may be admitted to a fine upon his submission, and a certificate of repairing either before or after verdict; but, if after verdict, there must be a *constat* to the sheriff, that he may return that the way is repaired, for the verdict being a record of conviction must be answered by matter of record.

1 Vent. 256. The defendant cannot give in evidence, that another is bound to repair, but it must be pleaded. Str. 184. 1 Hawk. ch. 76. s. 9.

8. Indictment against a parish, for not repairing a *highway*; upon not guilty pleaded, they cannot give in evidence that another is bound to repair, for, if that be the case, it must be pleaded; but where a private person is indicted for not repairing, he may give in evidence that another is to repair, because he is not bound of common right, as the parish is.

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HUE AND CRY.

Vide Statute 8 Geo. 2. ch. 16.

1. BEFORE the statute of *Winton*, the king had a certain farm or rent out of each county in *England*, for keeping *watch and ward*; and by that statute the counties were discharged of this rent, being enjoined to do it themselves.

Noy 155. Where notice is to be given of the robbery. Vide 8 G. 2. c. 16. March 11. Str. 170. Bull. N. P. 185. Wils. 105.

2. The person robbed ought to give convenient notice thereof, as soon as he can; and being robbed in the hundred of *A.*, and not knowing the confines of that hundred, he goes into the next hundred and gives notice there; it is sufficient, for that hundred ought to make hue and cry, and by that means the other hundred of *A.* will know of the robbery.

The purchaser of the land is liable to the charges after a robbery done.

3. If after a robbery a hundredor sells his lands, the purchaser or lessee is liable, for it is a charge upon the land itself.

Vide 2 Saund. 423. March. 11. Hutt. 125.

4. The party robbed is not bound to pursue the robbers himself, or to lend his horse for that purpose; and if he knows any of the robbers he must enter into a recognizance to prosecute; but still he has remedy against the hundred, if they are not taken.

The person robbed is not bound to pursue robbers.

5. And if any of them are taken within forty days after the robbery, or if they take them before the plaintiff recovers, the hundred is discharged.

Sid. 11. Where the hundred is discharged.

6. The party robbed must make oath before a justice of peace, that he did not know the robbers, or any of them; this he is enjoined to do by the statute 27 *Eliz. cap.* 13. Therefore where an action was brought on the statute of hue and cry, and upon not guilty pleaded, the plaintiff had a verdict: it was objected on arrest of judgment, that no time was laid of the examination before a justice of peace within twenty days before the action brought, which is traversable.

Of the oath to be made of the robbery within 20 days before the action brought.

IDEOT. See Remainder. [185]

IMPARLANCE.

1. THE QUEEN *v.* RAWLINS.

[Mich. 4 Annæ, B. R.]

AN *information* was filed against *Rawlins* on the first day of *Michaelmas* term, on which day he was bound by recognizance to appear, and accordingly did appear, and prayed an *imparlance*. And *per Northey, Attorney-General;* Formerly, when the defendant came in by *habeas corpus*, or upon his *recognizance*, he was to plead *instanter*, that if a declaration in a civil action is delivered the first day of *Michaelmas term*, or at any time before *Crastin' Animarum*, though the defendant is not bound to plead so as to try the cause that term, yet he shall plead so as to enter, and that the defendants ought not to have greater indulgence on the crown side; therefore, in this case, he insisted that the defendant should imparl only to *Crast. Animarum* of that term. *Et per Holt*, Ch. Just. Imparlances may be to a day certain, or to a return-day of the same term;

Mod. Cases 248. 1 Salk. 367. Imparlance given to another term.

or from one term to another; and that it was reasonable in this case to give the defendant leave to imparl, not to a day in the same term, but to a day of another term; because, if a summons had issued, and process had been continued, he might have stood out to another term, but might have been brought in before the end of that term, and then he must have pleaded *instanter*, and so he shall do now in another term.

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2. ELLIS *v.* THOMAS.

[Hill. 9 Will. 3. 1 Ld. Raym. 285. S. C.]

Where imparlance is to be allowed, where not.

IMPARLANCES are allowed in general actions of trespass, but not in a special *clausam fregit. Et per Holt*, Ch. Just. If it appears upon the record that an imparlance was due and denied, it is error; but then such error must appear on the record.

No imparlance is allowed in a *homine replegiando, or in assize*, because it is *festinum remedium*, unless upon good cause shewn.

INDICTMENT. See Restitution 3.

1. THE KING *v.* KNIGHT.

[1 Ld. Raym. 527. S. C.]

1 Salk. 375. Where the charge is not direct.

THE defendant was indicted, for that he being *nuper receptor, &c.*, did falsely indorse twenty Exchequer bills *quasi receptæ essent pro custumis, &c. in deceptionem, &c.* The judgment was arrested, for that *nuper receptor* doth not import that he was the king's receiver; then to say *falso indorsavit quasi receptæ essent*, is no direct charge of any thing which is criminal; it is true, it is said *in deceptioniem domini regis*, but that is only matter of inference and conclusion; whereas the charge contained in every indictment ought to be so certain, that the defendant may know what answer to make, and that the Court may set the fine in proportion to the offence; and likewise, that if the defendant should be indicted again for the same fact, he may plead *auterfoits convict;* it is true, the jury have found, that the defendant *falso indorsavit*, but that will not fix a guilt, for they are only to find the contents of the indictment; and if that will not amount to a crime, the adverb, *falso*, will not make it so.

2. ANONYMOUS.

[Trin. 2 Annæ.]

THE defendant was indicted *quare vi & armis centum oves, &c. cepit*, and a motion was made to quash it, for that it was no more than an action of trespass: But *per Curiam*, An indictment will lie for taking goods forcibly, but then such taking must be proved to be a breach of the peace; and though the goods are the prosecutor's own property, yet, if he take them in that manner, he will be guilty.

Indictment for taking goods with force, with the words "violenter, and proof made thereof." Comb. 7. 1 Haw. c. 60. s. 25.

3. ANONYMOUS.

[Trin. 7 Will. 3.]

INDICTMENT for scolding was quashed, because it was not said to be *ad magnam perturbationem pacis dominæ reginæ*, nor *subditorum*, or *ligeorum suorum*.

Indictment for scolding quashed. 1 Hawk. ch. 75. s. 5.

4. THE KING *v.* HOLLIDAY.

THE caption of an indictment was *proborum & legalium hominum de com' prædict' qui jurati & onerati super sacramentum suum presentant*, quashed, because it did not set forth, that they were *onerati*, &c., *to inquire for the *king and the body of the county.*

Indictment quashed for a defective caption. 2 Keble 471. *Postea 19. Sho. 272. 2 Hawk. ch. 25. s. 126. S. C. 5 Mod. 179. 6 Mod. 96. 1 Keb. 933. Comb. 374.

5. THE KING *v.* HEMMINGS AND GHENT.

THE defendants being *overseers of the poor*, were indicted for refusing to *account, &c.* for money by them received; and upon a demurrer to this indictment it was objected, that it set forth they had collected divers sums of money, but did not say *how much*, and this made the indictment *uncertain:* But *Holt*, Ch. Just. held, That it was [*not*] necessary to set forth *how much money* they had received, it being impossible to charge them with every particular sum, and the indictment is for refusing to come to an account: But a more material objection was, that the indictment set forth, that they & *eorum uterq.* converted the money to their own use; but as to that it was held, that the cheat of the one is the cheat of the other; but lastly it was objected, that this indictment would not lie, because another remedy was provided by †the statute, and of this the Court doubted (*a*).

Indictment against overseers of the poor, for refusing to account.

†Postea 15. S. P.

(*a*) *Vide* 1 *Burr.* 145. 2 *Burr.* 805. *Cowp.* 524.

6. THE KING *v.* HALL.

[Hill. 7 Will. 3.]

*Ante Forgery 1.

THE defendant was a *constable*, and he was indicted *quod cum Humfredus Hall*, being a constable, had seised eighty half-crowns, which were suspected to be clipped, and refused to deliver them to a justice of peace; this was held to be an offence, but not indictable (*a*); besides, the fact is laid by way of recital **quod cum, &c.*, and not positively (*b*).

(*a*) *Quære*, If this point can be law? it being held, that a public officer is indictable for neglecting or refusing to perform his duty. *Vide* 1 *Salk*. 380. *Queen* v. *Wyatt*, 2 *Burr*. 864. *K.* v. *Bootle*.

(*b*) Indictment quashed for this defect. 1 *Salk*. 371.

7. THE KING *v.* STONEHOUSE.

[Pasch. 8 Will. 3.]

Indictment for a private wrong not good. Postea 9. S. P. Vide Str. 866.

INDICTMENT against *Eliz. Stonehouse*, for that she intended to deprive *Henry Bradshaw* of several sums of money, did falsely and maliciously accuse him of *felony*, and of robbing her; this indictment was adjudged ill, because it was for a fact not indictable, it not being laid by way of *conspiracy*, so as to make it a public crime; and it being only a private wrong, the party hath his remedy by action on the case.

8. THE KING *v.* BAKESTRAW.

[Pasch. 8 Will. 3.]

Indictment will not lie at sessions for usury. Vide 4 Mod. 49. 2 Hawk. ch. 8. s. 38.

THE defendant was indicted at the *Old Bailey* for *usury*, and being convicted, he brought a writ of error, and the judgment was reversed, because the *court of sessions* had no jurisdiction in this matter.

9. THE KING *v.* ATKINSON.

Indictment for a particular wrong not good. Antea 7. S. P. 2 Hawk. ch. 25. s. 4.

THE mayor of *Newcastle*, being a justice of peace, made an order, that the Company of Tanners there should admit one *Young* to be a freeman of that company: The defendant *Atkinson*, who was master of that Company, and being served with this order, refused to obey it, and for this he was indicted: But, *per Curiam*, it is not indictable, for it is only a nonfeasance and particular wrong done to another.

10. THE KING v. SAVILL.

AN indictment was quashed, because there was no caption to it.

Quashed for that there was no caption.

11. THE KING v. GORGE.

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THE defendants were indicted at the sessions held in the city of *Worcester*, for keeping an open shop in the said city, not being free thereof, contrary to an immemorial custom there; quashed, for it is not a matter indictable.

What is not indictable.

12. THE KING v. BROWN.

THE justices made an order, that the defendant should pay *Stephen Paine*, a tailor, 7 *l.* for work done, which he (the defendant) refusing to do, was indicted; but it was quashed, for it is a matter not indictable.

What is not indictable.

13. THE KING v. BRADFORD.

THE defendant was indicted for not curing the prosecutor of an ulcerated throat, as he had agreed and undertaken to do; quashed, for it is no public offence, and no more in effect than an action on the case.

1 Ld. Raym. 366. Indictment quashed, for that it was not for a public offence. Vide 2 Bur. 1125. Str. 893.

14. THE QUEEN v. STEER & AL'.

[Trin. 3 Annæ.]

*THE defendants were indicted, for that they *piscerunt*, *&c. & viginti carpas de bonis & catallis* of the prosecutor, did take and carry away: *Per Curiam*, the *fish* could not be *bona & catalla* of the prosecutor, unless they were in a *stew-pond* or trunk, but they might be *pisces suos* in a close pond, and this is *ratione loci*, because they could not swim away; but they would not quash it upon a motion.

Mod. Cases 183. Indictment for taking 20 carps, de bonis & catallis suis.

15. ANONYMOUS.

[Mich. 2 Annæ. S. C. 2 Ld. Raym. 991.]

THE defendant was indicted for assaulting and beating a custom-house officer in the execution of his office; but this indictment was quashed, because by the statute 13 &

Offence not indictable, if another punishment is prescribed by the statute.

Antea 5. S. P. 13 & 14 Car. 2. cap. 11. par. 6. Vide 2 Hawk. ch. 25. s. 4. Str. 832.

14 *Car.* 2. a particular method of punishing offenders of this nature is prescribed, (*viz.*) By *fine* and *imprisonment*, by the justices of peace: And *per Curiam*, So it hath been resolved by all the Judges at *Serjeant's Inn*, in a case between the King and *Watson* (*a*).

(*a*) *Quære*, If this is not an offence at common law? If so, indictment would unquestionably be maintainable, the act being merely positive. *Vide*, as to the offence, 19 *G.* 3. *ch.* 69.

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16. THE QUEEN *v.* LANGLEY.

[Hill. 2 Annæ, 2 Ld. Raym. 1029. S. C. 2 Salk. 697. S. C. pl.1.]

Mod. Cases 124. Words spoken to a magistrate not in execution of his office, not indictable. Vide 2 Salk.697. pl. 2.

THE defendant was indicted for saying to the mayor of *Salisbury: You, Mr. Mayor, I care not a fart for you;* and, on another day, for saying to him, *you are a rogue and a rascal;* and upon a demurrer to this indictment it was insisted for the defendant, that these words do not appear to be spoken of the *mayor* in the execution of his office, and therefore this indictment would not lie; he cannot be * imprisoned for such words, neither can he be † indicted: *Holt*, Ch. Just. These words are not indictable, because it doth not appear that the mayor was in the execution of his office, nor that he was a patent officer; for it would have altered the case, if it had appeared that he was a *justice of peace* by commission from the queen, for then he would have been indictable, because the words would have been an aspersion upon the queen and upon the government in general by whom he was employed; but here it doth not appear he was a justice of peace, or if he was, it doth not appear that he was so by commission or appointment of the queen, but of the corporation; it is true, if these words had been *written* as they were spoken of the mayor, an indictment would have laid, for *litera scripta manet;* and there are many cases which prove, that the same words, when ‡ written, are actionable [*indictable*], which are not so when spoken: *Et per totam Curiam*, Words which directly tend to the breach of the peace are indictable, as where one man challenges another to fight, and the commission of *oyer* and *terminer*, *de propalationibus verborum*, is to be understood of words spoken against the government, or which amount to a *scandalum magnatum*, *&c.* But, for these little offences *contra bonos mores*, the law has made a proper provision; and that is by requiring *surety of the peace*, or for the *good behaviour*, and by committing the offender if he refuse to find such sureties; or if he speak such words in court, they may proceed in a summary way against him, by fining him for a contempt of the Court, and by committing him till he hath paid the fine: Cases cited *contra*, *viz.* 1 *Cro.* 503. 2 *Bulst.* 139. *Mod.* 139.

* 11 Rep. 95.
† 3 Cro. 78, 689. Moor 247. 1 Vent. 16.
‡ 1 Sid. 270. 1 Lev. 139.

17. THE QUEEN *v.* LANE.

The defendant was indicted on the statute 5 *Eliz.* for using the *trade* of a barber, not having been apprentice to it for *seven years;* and a motion was made to quash it, because it did not conclude *contra pacem:* But *per Holt*, Ch. * Just. There can be no reason for this objection, for it would be very hard to make a *barber's* shaving a man by consent to be *contra pacem;* besides, it is laid to be *contra formam statuti*, and therefore this indictment is good. But *per Powell*, Just. and the other Judges, every act which is contrary to the law is contrary to the peace, and a breach of the peace: Therefore by the three other Judges, *contra Holt*, Ch. Just. this indictment was quashed.

Mod. Cases 128. Indictment for using a trade quashed, because it did not conclude contra pacem. 2 Hawk. ch. 25. s. 114. 2 Hale Hist. 188. 3 Bac. Ab. 109.

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18. ANONYMOUS.

[Trin. 2 Annæ.]

THE caption of the indictment was *per sacram'm* of the jury *proborum & legalium hominum, &c. jurat' & onerat'*, without saying *impanellat';* and for that reason it was moved to quash it, but denied *per totam Curiam*.

Jurat' & onerat', and did not say impanellat', yet good.

19. THE QUEEN *v.* COTESWORTH.

[Trin. 3 Annæ.]

THE defendant was indicted for abusing Dr. *Ratcliffe;* and it was objected against the caption, that it was *juratores pro domina regina & corpore com' jurat' & onerat', &c.* now it should not be † *pro domina regina & corpore com'*, but *pro corpore com';* but it was disallowed.

Mod. Cases 172. Pro domina regina & corpore com'. 2 Hawk. c. 25. s. 126. † Antea 4.

20. THE KING *v.* KEATE.

[Hill. 8 Will. 3. 1 Ld. Raym. 138. S. C.]

HE was indicted upon the statute of *stabbing*, for that he drew his sword and stabbed *James Wells*, he *having not first struck;* but did not say, *having not a weapon first drawn;* and concluded *contra formam statuti:* The better opinion was, that the indictment should set forth, that the deceased *had not a weapon first drawn.*

5 Mod. 287. Upon the statute of stabbing, without saying having a weapon first drawn, not good. 2 Hal. Hist. 186.

21. THE QUEEN v. DANIEL.

[Hill. 2 Annæ.]

Cited 2 Ld. Raym. 1116. Mod. Cases 99, 182. 1 Salk. 380. Indictment for enticing an apprentice to absent, will not lie.

THE defendant was indicted for enticing an apprentice to depart from his master, & *seipsum absentare* from his service; it was moved in arrest of judgment, that this indictment was naught, because it did not appear *how long he absented*, and there was no averment that he did absent; it is true, it is implied, but it is not expressly alleged; and, as to the principal matter, *Holt*, Ch. Just. held, That the seducing an apprentice to absent was not indictable, because it doth not affect the public. But *per Powell*, Justice, It doth affect the public as much as the persuading [192] a woman to absent from her husband, because it tends to destroy the first foundation of society. But, *per totam Curiam*, This indictment is naught, for not averring, that the apprentice *did absent*; it is true, the word *absentare causavit* implies, that he did *absent*, but an indictment must not only shew the cause, but the effect which follows the cause. And afterwards, in *Trinity term*, it was adjudged, that an indictment would not lie for seducing an apprentice to leave his master, but only an action on the case; or if it was a forcible taking him away, then an action of trespass *per quod servitium amisit*.



22. THE QUEEN v. TRACY.

Mod. Cases 30. Indictment for persuading a justice of peace not to take bail. 2 Hawk. ch. 25. s. 60. Mod. Cases 99.

THE defendant was indicted, for that he procured one *Muriell* the prosecutor to be arrested by a warrant from a justice of peace, &c. and persuaded the justice to refuse bail, but did not allege that *any bail was offered;* and that *when Muriell was committed*, he (the defendant) *extorted divers sums of money* from him, but did not *expressly allege that Muriell was committed*, nor what *sum was extorted* from him; and for these reasons this indictment was quashed after verdict; for it being a complicated offence, the defendant must be guilty of all or none; but they would not discharge him without he first entered into a recognizance to appear to a new indictment, which he did; and afterwards he was indicted *de novo*, for that he, together with *A.* and *B.*, intending to oppress *Muriell*, did, in the parish of *St. Giles's in the Fields*, in the county of *Middlesex*, procure him to be arrested *pretextu warranti*, and brought him before one *Chamberlaine*, a justice of peace *in the parish of St. Margaret's* in the said county; and, intending farther to oppress him, persuaded the justice to refuse bail, *though good bail was offered*, and to commit him;

and *avers, that he was committed*, and that *Tracy* persuaded the gaoler to lay him (the prosecutor) in irons, who by that means *extorted 5l. from him, &c.* Upon not guilty pleaded, the defendant was found guilty; and now it was objected in arrest of judgment, that here was a *mis-trial*, for the *venire* was only from the *parish of St. Giles's* whereas the fact did arise from the *parish of St. Margaret's*, as well as from the *parish of St. Giles's*. And *per Curiam*, This is a *plain mis-trial;* but yet the defendant hath forfeited his recognizance, because he was to try the cause *with effect*, that is so as the Court may proceed to judgment; and if defendants will make such faults on purpose, their recognizances shall be estreated, or a *scire facias* shall be brought thereon in this court; for *B. R.* may take either course, unless the defendant will enter into a recognizance to try it again *de novo*, which accordingly was done, and the defendant was tried and found guilty again; and it was insisted for him in arrest of judgment, that his persuading Mr. *Chamberlaine* the justice to refuse bail was only matter of opinion, and that the extortion was not by the defendant, but by the *gaoler;* so that there was no offence charged in this indictment against the defendant, for the rest is only taking a man upon a lawful warrant, which is no crime. But *per Holt*, Ch. Just. He is guilty even of the oppression and extortion committed by the gaoler, because he procured him to be wrongfully put into gaol; for if *W. R.* wrongfully imprisoneth *W. W.*, and the gaoler detains him till so much is paid, in such case, he who was the prisoner shall have an action of false imprisonment against *W. R.*, for imprisoning and detaining him until he paid so much money; and this is a taking by *W. R.*, and it must be illegal to use any unlawful means to oppress another. It was held in this case, that wherever a justice of peace may by warrant arrest a person, he hath authority to bail; and that, before any indictment found, the justice may grant a warrant for apprehending a man for a misdemeanor, and bind him to the peace, or over to the sessions.

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2 Hawk. ch. 13. s. 15. ch. 15. s. 54.

In the case above-mentioned it was held, that where the defendant is indicted, he cannot send a plea into the office, without giving security to try it at his own charge; but if he come into court, he may put in his plea, and the Court is bound to receive it, but then he must be committed, unless he give security to try it; and if he chooses to be committed, then the trial must go on at the charge of the prosecutor; but if he give security, the trial must be at his own charge.

23. THE KING *v.* CROSS.

[Hill. 13 Will. 3. B. R. 1 Ld. Raym. 711. S. C.]

Indictment for buying stolen goods, knowing them to be stolen. Vide stat 22 G. 3. c. 58.

THE defendant was indicted for buying *stolen* goods, *knowing* them to be *stolen;* and upon not guilty pleaded, he was convicted; and it was moved in arrest of judgment, that by the statute the buyer is made accessary to the *felony*, for which he ought to be indicted, and not for a *misdemeanor or trespass*, as he was in this case, and so it was adjudged; for *per Holt*, Ch. Just. at common law, this offence was more than a trespass, it was evidence as an accessary not present, but after the fact was done.

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24. THE KING *v.* SUMMERS.

1 Lev. 139. Indictment at the sessions, for writing a scandalous letter.

THE defendant was indicted at the sessions, for writing a scandalous letter to one *Mellith*, concerning a young woman whom he intended to marry: Upon not guilty pleaded, he was found guilty; and afterwards he brought a writ of error; and the error assigned was, that this was a private letter, for which he was not punishable by way of indictment; or if an indictment would lie, yet not before the justices of peace at their sessions. *Sed per Curiam*, This is an offence, and indictable before the justices in sessions, because it tends to the breach of the peace.

Raym. 276. Indictment for felony, in running away with goods, &c. Kel. 82. Addington, Penal Stat. 376. 251.

Adjudged, That where a person came to a semstress's shop, and asked her to shew him some linen, which she did, and delivered it into his hands, and then he run away with it, that this is felony; for though the goods were delivered by the owner, yet they were never out of her possession, because though the contract might be begun by asking and telling the price, yet it was not perfected; and the subsequent act of his running away doth plainly shew his intention to take the goods feloniously before the property was altered, for which he was indicted, convicted, and executed.

2 Vent. 94. Kel. 83. Sid. 254. Raym. 276. Indictment for using the process of the law to a felonious purpose. 3 Inst. 108.

So where a man, who had no manner of a title to a house, brought an *ejectment*, and procured an *affidavit* to be filed of the delivery of the declaration to the tenant in possession, and, for want of appearing and pleading, got judgment at his own suit, and then sued out an *habere facias possessionem*, and got a warrant thereon from the *high bailiff of Westminster*, directed to one of his bailiffs, who, with the plaintiff himself, turned the defendant out of possession, and seized all the goods, and converted them to his own use; this was adjudged felony, for which he was indicted, convicted, and executed, for he made use of the process of the law, with a felonious purpose.

INDUCTION AND INSTITUTION.

1. PATRONS did originally fill all churches by *collation* and *livery*, as they do now to free chapels, till this power was extorted from them by canons.

Seld. Tithes. ch. 6. par. 2. ch. 9. par. 4.

2. Where the *archdeacon* makes a mandate for induction, if it is executed by one who is not resident within the archdeaconry, yet it is good.

Noy 134.

3. *Morgan* was admitted and *instituted* to a benefice; afterwards one *Glover* was presented, admitted, instituted, and *inducted;* then *R. R.*, the king's presentee, was inducted; "and then *Morgan* was *inducted;*" and *Glover* entered; and the question was, Whether *R. R.* or *Glover* had the better title? *Et per Curiam*, *Morgan* being *instituted*, that was a *plenarty* against any common person, therefore the *induction* of *Glover* was void, and he had but a mere possession, which was defeated by the induction of *R. R.*, the king's presentee; and likewise by the induction of *Morgan*, who had the first right, so that each of them had a better right than *Glover;* therefore *R. R.* may maintain an ejectment against him.

Institution alone without induction is a plenarty against a common person. 2 Wilson 174.

1 Roll. Rep. 191.

INFANTS.

1. ANONYMOUS.

IT was held. That an infant cannot be a *parson*, *juror* (*a*), *attorney* (*b*), *bailiff* (*c*), or *member of parliament* (*d*); but he may be a *mayor* (*e*), *sheriff*, *gaoler*, or *steward of a court*, by descent; but not by purchase, unless granted to him in reversion, or *ad exercendum per se vel deputatum suum* (*f*).

What officer he may be, what not.

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2. That his lease which he makes, without reserving rent, is void; if rent is reserved, it is voidable, and so is

What leases made by him are void & voidable.

(*a*) *Hob.* 325. (*b*) *March* 92.
(*c*) *Co. Lit.* 172. *Equi. Ca. Abr.* 6.
(*d*) *St.* 7 & 8 *W.* & *M. ch.* 25. *s.*8.
(*e*) *Vide Rep. B. R. Tem. Hard.* 8. *Cowp.* 226.
(*f*) *Vide Cro. Car.* 279.

a lease made to him; but his lease of ejectment is good (*a*).

What contracts made by him are good, what not.

3. That all contracts for necessaries, and which concern his person, are good, as for *debt*, *apparel*, *physic*, or *learning*, *&c.* But it is otherwise if the contracts do not concern his person, as if it is to *repair his house* (*b*), *or to carry on his trade* (*c*), neither shall his contract to be an apprentice (*d*) bind him, unless in *London*, and there it is good by the custom (*e*).

4. Money borrowed for necessaries binds him, if he apply it accordingly; but if misapplied, then his contract is not binding (*f*).

5. All acts of necessity bind him, as presentations to benefices, admittances, and grants of copyholds (*g*), and assenting to a legacy.

6. All his acts which have no colour of advantage to him, or which are without any consideration, are void; but his feoffment is only voidable, unless livery is made by attorney, and then it is void (*h*).

7. A judgment by default, after his appearance *per guardianum*, shall bind him; but not if he ever appear, or if he doth appear in person and make default.

How he must sue and be sued. *Jones 177.

8. He cannot answer but by guardian, but he may sue either by *prochein amy* or by guardian; and his suit by *prochein amy* is by *the statute, and that is where he sues his guardian, or where his guardian will not sue for him.

9. His acts *in pais*, as feoffment or other deeds, may be avoided by plea or entry, after or before he is of full age, and so may his deed of bargain and sale; but his acts on record, as his fine levied, recovery suffered, or statute acknowledged, must be avoided by writ of error or *audita querela* during his nonage.

For what he is punishable. Vide 3 Bac. Abr. 130.

10. He is punishable for permissive waste, for escapes, for perjury, for not coming to church, for cheating with false dice, for batteries, for slander, *&c.*

(*a*) *R.* that a lease by an infant, without rent, is only voidable. *Zouch* v. *Parsons*, 3 *Burr.* 1794. See the case at large, for much learning upon this subject.

(*b*) *Qu.* & *vide* 3 *Burr.* 1717. 2 *Bulst.* 69.

(*c*) *Vide ac. Cro. Jac.* 494. 2 *Str.* 1083.

(*d*) *Vide Cro. Car.* 179. *Caldec* 26. 3 *Bac. Abr.* 547.

(*e*) as to the general points of this paragraph, *vide* 3 *Bac. Abr.* 132.

(*f*) *Vide* 1 *Salk.* 279., and notes thereto. *Co. Lit.* 72. b.

(*g*) 4 *Co.* 23. b.

(*h*) *Vide* 3 *Burr.* 1794.

11. ELLIS *v.* ELLIS.

[Hill. 9 Will. 3. 1 Ld. Raym. 344. S. C.]

ASSUMPSIT against an executor for *money lent* to his testator; the defendant pleaded, that his testator was an infant; the plaintiff replied, that the *money lent was for necessaries*, and good; for an infant is chargeable for *money lent, if it is laid out for necessaries*, according to his degree; but all that is at the peril of the lender.

5 Mod. 368. See 1 Salk. 386. Earle v. Peale. He is chargeable for money lent to buy necessaries. S. C. 12 Mod. 197. Comb. 482.

12. WILLIAMS *v.* HARRISON.

[Trin. 3 Will. 3.]

ADJUDGED, That if an infant accepts a bill of exchange, he may plead infancy upon an action brought against him, because the custom of merchants is part of the law of the land; and it is not a local custom, as in *London*, for an infant to bind himself apprentice, *&c.*

He may plead infancy to the acceptance of a bill of exchange.

13. SCORE *v.* BOWLES.

[Mich. 2 Will. 3.]

IN replevin against three, they all made cognizance by attorney, and judgment being given for the plaintiff, a writ of error was brought in *B. R.*; and the error assigned was, that one of the three defendants was an infant, but it was disallowed; for *per Holt*, Ch. Just. this matter was pleadable in abatement, and therefore not assignable for error.

Where infancy is pleadable in abatement, it shall not be assigned for error. Vide Str. 25. ac.

INFORMATION. [198]

1. THE KING *v.* ROBERTS.

[Pasch. 4 Will. 3. B. R.]

INFORMATION against a *common ferryman*, setting forth the accustomed rates to be, (*viz.*) for the passage of a man and horse, 1 *d.*; for a score of oxen, 7 *d.*; for a score

Information not good for the uncertainty. S. C. 1 Sho. 389. 4 Mod. 100.

* 3 Bulst. 347. 2 Cro. 324. 2 Leon. 38. 1 Roll. 80. 1 Mod. 188. Postea 6. Ld. Raym. 475. 2 Hawk. ch. 25. s. 57.; and note to the 6th edit. thereof. Com. Indictment, C.5.

of sheep 2*d.* *&c.*; and that the defendant being the *ferryman*, from such a day to such a day, did take of several of the king's subjects, unknown, divers sums of money exceeding those ancient rates; (*viz.*) for the passage of one man and a horse 2*d.*, for every score of oxen, 12*d.*, *&c.* Upon not guilty pleaded, the defendant was found guilty; but * the judgment was arrested for the uncertainty as to what the defendant did take, and of whom, and of how many persons, for every taking was a separate offence.

2. THE QUEEN *v.* TAYLER.

[Pasch. 2 Annæ, B. R. 2 Ld. Raym. 879. S. C.]

Information for speaking treasonable words of the dead.

INFORMATION against the defendant, setting forth, that he, on the 30th *day of January*, *proditorie*, spoke these words, (*viz.*) *King* CHARLES *the First was rightly served in having his head cut off, and it was a pity that his two sons,* CHARLES *and* JAMES, *were not served so too; in contemptum Gulielmi tertii nuper regis, legumque suarum, & ad malum exemplum omnium aliorum in hujusmodi casu delinquentium, ac contra pacem dicti nuper regis, &c.* Upon not guilty pleaded, the defendant was found guilty; and it was moved in arrest of judgment, that these words were spoken of the dead, and they are not averred to be spoken with an intention to prejudice the government; and they are not aggravated by the word *proditorie*, because that is applicable only to treason, which this is not. *Sed per Curiam,* These words affect the living, though they were spoken of the dead, and they advance a commonwealth principle contrary to law; and therefore there needs no averment that they were spoken with an intent to injure the government, for the words import a crime of themselves, and endanger the queen and monarchy; and though † the crime is only a misdemeanor, yet the word *proditorie* is proper in this information, because this misdemeanor has a tendency to treason, and shews a treasonable intent in the speaker. He was fined forty marks, being but a poor tanner, and to stand twice in the pillory.

† See Cro. Car. Hugh Pines's case.

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3. THE QUEEN *v.* HOLFORD.

Where a thing shall relate to the last antecedent, where not.

INFORMATION against the defendant for subornation of perjury, setting forth, That whereas *in curia domini regis coram ipso rege apud Westm' in com' Middlesex*, one *Rhodes nuper de D. in com' Surrey*, oat-meal maker, had impleaded the defendant *Holford*, for that whereas he was

indebted to the plaintiff *in the parish of St. Clement's Danes, in com' prædict'*, and promised to pay, &c.; and that whereas, upon an accompt stated between them, the defendant was found in arrear, &c., and promised to pay, &c.; and the defendant pleaded not guilty; and at the trial did procure one *W. R.* to swear, that he was present at the stating the said accompt, &c., whereas in truth he was not present, &c. To this information the defendant pleaded not guilty; and the cause being tried at the *Nisi Prius, in Middlesex*, he was found guilty; and it was moved in arrest of judgment, that the fine would be entire; and therefore, if either of the assignments was naught, no judgment could be given; but this objection was disallowed, and thereupon another objection was made, (*viz.*) that the cause of action being laid *in Surrey*, it could not be tried in *Middlesex;* and here the cause of action was laid *in Surrey.* It is true, it is said, that the defendant was indebted to the plaintiff *in the parish of St. Clement's Danes, in com' prædict'*, which must be in the *county of Surrey*, because that was the *county* last-named, and therefore it must relate to *that county*, which is very true, (*viz.*) *ad proximum antecedens fiat relatio;* but that rule hath an exception, (*viz.*) *nisi impediat sententia*, as it plainly doth in this case.

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4. THE KING *v.* GALL.

[Hill. 10 Will. 3. B. R. 1 Ld. Raym. 370. S. C.]

1 Salk. 372. Where prosecutions on penal statutes must be in proper counties.

THE defendant bought and sold live cattle in the county of *Norfolk*, not having kept them so many weeks as required by the statute * 5 & 6 *Ed.* 6., and thereupon an information was brought against him in *B. R.* in *Middlesex.* And *per Holt*, Chief Justice, who said ten judges had resolved these points.

* Cap. 14.

1. That the statute † 21 *Jac.* 1. did not extend to any offences created by *subsequent penal statutes*, so that prosecutions on such statutes are not restrained to the proper county; but that informations upon penal statutes made *before that act*, 21 *Jac.* 1., must be brought in the proper county where the fact was done.

† Cap. 4.

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2. That an action of debt upon the statute ‡ 5 *Eliz.* for using a trade, not having been apprentice to it for seven years, must be brought in the proper county where the offence was committed, and not in *B. R.*, unless the fact was done in that county where the King's Bench sits, and then the action may be brought in *Middlesex;* and *Holt*, Ch. Just. denied the case of § *Barnes and Hughes* to be law, which is reported in many books.

‡ Cap. 4.

§ 1 Vent. 8.

Who shall be a common informer, and who not.

4. Debt upon the statute 23 *H.* 6. against the mayor of *Dorchester*, for a false return of a burgess to parliament, by which statute 40 *l. is given to the king*, *and* 40 *l. to the party grieved*, and not returned, so as he sue for the same *within three months after the beginning of the parliament, or to any other person who, in default of him so chosen, shall sue for the same:* The person chosen did not sue within the three months; but the prosecutor after the three months, and before the end of one year next following, sued out a *latitat*, but not *within a year after the offence:* The question was, Whether he should be taken to be a common informer? and so by the statute 31 *Eliz.* ought to *bring his action within a year after the offence*, which was not done in this case; for the *latitat* was sued *within a year after the end of three months*, in which time the party grieved was allowed to bring his action. The better opinion was, that he was no common informer, because there was no time limited by the act when the prosecutor should bring his action; he stands now in the place of him who should have brought his action within three months, and he was no common informer; if he had brought his action for the whole 80 *l. tam pro domino rege quam pro seipso*, he had been within the statute; the plaintiff had judgment. But *per Holt*, Ch. Just. a *latitat* cannot be a commencement of a suit upon a penal law (*a*), 4 *Mod.* 129. *Culliford* v. *Blandford*, at the king's pleasure: This statute is confirmed by 20 *Rich.* 2. *cap.* 1., with an additional punishment, *viz.* a fine to the king upon a trial at bar, the defendant was acquitted. 3 *Mod.* 117. Sir *John Knight's* case.

Antea 1 S. P.

6. Information against the defendant for *extortion;* setting forth, that there is a common passage and ferryboat, for transporting people and cattle, at such rates, setting them forth; and that the defendant being a com-

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mon boatman, did *carry, at several times*, several persons, and several score of sheep; and that during *that time* he did *extort de quibusdam ignotis*, for the use of the said boat in transporting, (*viz.*) *pro transportatione cujuslibit equi 2d. Et pro quibuslibet viginti ovibus 4d. sic secundum ratam;* after a verdict for the informer, it was moved in arrest of judgment that the information was ill, because it is not said *from whom* he extorted those, but only *de quibusdam ignotis*, and no *particular time* is mentioned *when* he extorted, nor how *many score* of sheep were carried over. *Et per Curiam*, Every taking is a several offence; and if this information should be good, it may as well be said,

(*a*) *R.* That it is a sufficient commencement. *Carth.* 232. *Show.* 353. But it must be *actually* sued out within the limited time. 3 *Bur.* 1241.

that an indictment for battery will be good, setting forth, that he *beat so many* of the king's subjects between such a day and such a day; the judgment was reversed. 4 *Mod.* 1000. *The King* v. *Roberts.*

INHIBITION.

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1. LUNNE *v.* DODSON.

[Pasch. 13 Car. B. R.]

The effect of an inhibition. Burn. Eccl. Law, tit. Inhibition.

AN inhibition is either *hominis* or *juris;* it is *ne vesitationem facias, vel uliquum jurisdictionem ecclesiasticam contentionem vel voluntaturium habeas:* Thus, when an *archbishop* visits, he inhibits the bishop; when a bishop visits, he inhibits the archdeacon; and the reason is, to prevent scandal and distraction, and this continues till the relaxation of the inhibition, which is not till the last parish is visited; and then it is entered *nulla parochia restat visitanda,* for he may hear of no faults till he come to the very last parish.

2. Now, after such an inhibition upon a metropolitical visitation, if a lapse happens, the bishop cannot institute, because his power is suspended, and therefore the archbishop is to institute; for it is not only penal in the bishop so to do, but the institution itself is void, because it is an act of jurisdiction from which he was suspended. [202]

3. But it may be a question, in the case of a *collation,* Whether, if a lapse happen, the bishop may collate? because it is a kind of title; but the better opinion is, he cannot, because it is not by way of interest, but by way of provision for the cure, and to supply the negligence of the patron; this appears, because the patron may present at any time after a lapse, and before collation.

INNUENDO. See Libel 4.

JOINDER IN ACTION.

3 Lev. 362. Who may join in an action. 2 Wilson 414.

1. ADJUDGED, That where two or more receive a joint damage, they may join in an action; as where two churchwardens brought a *mandamus* to the official to swear them, who refused and made a false return, they may join in a suit against him for such false return; but, where the damages are several, the parties cannot join.

Where the action must be several, and not joint. 1 Salk. 10. 1 Wilson 171. S.P.

2. *A.* owed 20*l.* to *B.*, as executor, and 10*l.* more in his own right; one action will not lie against him for the whole money, because there must be several judgments.

6 Rep. 87. 1 Vent. 223, 366. What actions may be joined, and what not. Al. 9. 3 Wils. 348, 356.

3. An *action on the case* and an action of *trespass*, or case and trover, may be joined in one action, because the foundation of both are on a wrong, and not guilty is a good plea to the whole; but *assumpsit and trover* cannot be joined, because there must be different pleas. See 2 *Wilson* 319, as to this point.

Sid. 245. 2 Wilson 319.

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*4. *Case of trover* was brought against a *carrier* for money delivered to him; this was adjudged ill after a verdict, because it is not founded on a wrong alone, but on a custom of the realm; and a general verdict could not be given.

1 Lev. 107. Sid. 157. Raym. 80. Where two may join in one action.

5. The lessor made a lease to *W. R.*, who covenanted *to repair;* afterwards the lessor assigned one moiety of the reversion to *B.*, and the other moiety to *C.;* adjudged, that both of them may join in one action of covenant against *W. R.*, the lessee, for *not repairing*, for it is no more than a personal action to recover damages, in which *tenants in common* may join.

What actions may be joined, what not. Jenk. 211.

6. In actions personal, where a tort is by common law, and a tort by statute, they cannot be joined; so it is where a contract is by common law and by custom.

7. But, where several torts are by common law, they may be joined, if personal; as for instance, *trespass for several trespasses, or trespass and case*†.

† Trespass vi & armis, and trespass on the case, cannot be joined, because they require different judgments. 2 Wilson 319.

2 Wilson 252.

8. So where several contracts are by common law, as debt upon several bonds; debt upon a *mutuatus* and *judgment*, or debt for rent and *indebitatus* for money lent; for though one plea will not answer both, as in an action of debt upon a judgment and upon a *mutuatus*, yet there is the same process and judgment; but it is not so in torts and contracts, for the process and judgment are not the same.

9. BOSON *v.* SANFORD.

[Hill. 2 Will. 3. B. R.].

CASE, *&c.*, in which the plaintiff declared against six defendants; setting forth, that he loaded a ship whereof they were owners, and that they undertook the goods should be carried safely, but by their negligence the said goods were damnified by fresh water: Upon not guilty pleaded, it appeared at the trial, that there were more part-owners of this ship than these six defendants; and because all the part-owners must be equally liable, the action being *quasi ex contractu*, the Court held, that the defendants should take advantage of it in evidence (*a*); for where the plaintiff brings an action on the case, he ought to declare according to the truth of his case; and if the jury find a contract made by more than against whom the plaintiff had declared, it is a *variance;* and if this had been pleaded in abatement with a traverse, *absque hoc quod super se assumpsit tantum*, it had been ill, because it is no more than the general issue.

3 Lev. 258. 3 Mod. 321. 2 Salk. 440. Where the action is quasi ex contractu, it must be brought against all.

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(*a*) This is not law. *Vide* note to *S. C.* in 2 *Salk.*

10. DALSON *v.* TYSON.

[Trin. 7 Will. 3. B. R. Ld. Raym. 48. S. C.]

THE plaintiff declared against a *common carrier*, and one count was *in assumpsit*, and the other was in trover; this was adjudged ill after a verdict, for the one sounds in *contract* and the other in *tort;* the like case is 1 *Sid.* 244. But ill reported: *Et per Holt*, Ch. Just. *tenants in common* may either join or sever in debt, but in avowry they must sever, because it goes to the realty; therefore if three tenants in common distrain three beasts, each of them must avow for one beast.

5 Mod. 90. 1 Salk. 10. Vent. 233. Assumpsit and trover cannot be joined, 5 D. & E. 249. 2 Blackst. Rep. 1077. Sir W. Jones 251.

JOINTENANTS AND TENANTS IN COMMON.

See Joinder in Action, 10.

" The Serjeant's Observations on this title are chiefly what was " said by *Holt*, Ch. Just. in *Fisher* and *Wigg's* case, herein- " after mentioned." Post. 206.

What makes a tenancy in common, and what a jointenancy.
*1 Rol. 441.
1 Wilson 341.

1. ss. WHERE there are two *jointenants for life*, each of them hath an estate for his own life and for the life of his companion; and for that reason, if one of them makes a lease, it shall continue not only during the *life of the lessor, but after his death, during the life of his companion; for the lease, which is only derivative, shall continue as long as the original estate out of which it was derived.

Jones 55. in Eustace's case.
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2. But this seems contrary to another resolution, where it was held, that he hath only an estate for his own life, and a possibility of surviving his companion to be entitled to his part; and therefore, if he grant over his estate, that possibility is gone; and if he die, the estate of the grantee shall revert to him in the reversion.

3 Cro. 697.
Dyer 25.
Vide 1 Salk.226.

3. *Goods*, or a *term for years devised to two equally*, makes a *tenancy in common*, and not *jointenants*, because an equal benefit is intended to both, which cannot be if all must survive to one; but *lands to two equally* makes a *jointenancy*, for having them for life there is no inequality between them; but a *devise* to two equally and *to their heirs* makes a *tenancy in common*, because the word *heirs* would be in vain if they were *jointenants*.

†Goulds. 183.

4. So a devise to *two*, *part and part alike*, they are *tenants in common* and not *jointenants*, for there can be no *parties* between *jointenants*: †But a *devise to two equally to be divided* by *W. R.*, they are not *tenants in common* till after the division is made.

2 Cro. 259.
Yel. 183.
1 Bulst. 42.

5. *Devise* to his *two sons*, and to the heirs of their bodies, but that his executors shall enjoy it till they come to their several ages; the sons are *jointenants for life*, because the estate hath (*a*) several commencements, for each may enter at his full age, but not to gain an estate, but only the possession and profits.

‡ Vent. 216.
1 Mod. Ca.
2d. part, 158.
2 Rol. 90.

6. ‡ Devise to two, equally to be divided, and *to the Survivor*, they are *jointenants* by virtue and force of the last word.

(*a*) *Quære*, If the word *not* is not here omitted?

7. * Where a bond is made to two, the obligees are *jointenants*, and the survivor shall have the bond and the duty; so of covenants, debts, and contracts at common law.

* 1 Inst. sect. 282.

8. *Three* were *jointenants of goods*, and two of them brought an action of trover, without the other; adjudged, that the defendant might plead this matter in abatement; but if he plead not guilty, the plaintiffs shall not be nonsuit, though this matter appears upon evidence, but shall recover damages for their two parts.

2 Vent. 113.

9. *One jointenant granted*, bargained and sold all his estate and interest to the other; adjudged, this is a good conveyance, and shall pass his moiety to his companion, for the word *grant* amounts to a release, confirmation, and surrender, as well as to a gift, but then the party must plead it as a *release*, for one jointenant cannot grant to another, therefore he must plead *quod relaxavit*, and not *quod concessit*.

1 Vent. 78. 2 Saund. 96.

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10. *Two tenants in common; W. R.* brought trespass against one of them: Adjudged, that he may plead in abatement, that he is tenant in common with another, but if he pleads not guilty, he cannot give it in evidence.

11. And yet if *one tenant in common* bring an action of trespass against another, the defendant may give it in evidence; the law is the same between *jointenants*.

1 Vent. 214. 2 Lev. 113. Com. Abatement, E. 10.

12. *Two jointenants for life;* one made a lease for ninety-nine years, to commence after his death, if the other should so long live; the other surrendered: *Et per Curiam*, The lease is good in point of creation, and shall continue, though the lessor dies, if the *jointenancy* had continued; but that being severed by the surrender of the other, there can be no survivorship, and therefore the lease will determine by the death of the lessor, for his lease as to survivorship depends upon the continuance of the *jointenancy*, which was only a mere possibility, and is now destroyed, and by consequence the lease is so too, and so it would have been if they had made partition; but it had not been so if both of them had joined in the lease, and afterwards had made partition or surrendered.

Noy 157. Vide Lit. Sec. 289.

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13. FISHER *v.* WIGG.

[Hill. 12 Will. 3. 1 Ld. Raym. 622. S. C.]

THE case was: *ss.* The father being seised of a copyhold of inheritance, surrendered the same to the *use* of his five children, *equally to be divided, and to their heirs respectively;* the question was, Whether they were *jointenants* or

1 Salk. 391. Surrender to the use of his children, equally to be divided, and to their heirs re-

spectively, makes a tenancy in common.

tenants in common? And per Gould and *Turton*, Justices, They are *tenants in common*, because the last distributive words, (*viz.*) *and to their heirs respectively*, shew, that it was the intent of the surrenderor it should be so, which, in the case of a copyhold and of an * use, ought to be pursued: But *per Holt*, Ch. Just. They are *jointenants;* as to this estate being copyhold, that is not to be regarded, for that will no more pass by improper words than other estates, and this is not properly *an use*, for there is no *cestui que use* in this case, nor any statute operation, but the surrenderees are in from the lord of the manor, and the surrender to the use of such persons shews only the intention of serving such estates and limitations; so that this use is no more than a gift to five children, *equally to be divided*, and that is a *jointenancy* and not a *tenancy in common*, and for these reasons following: *First*, Because the words *equally to be divided*, import no more than the precedent words implied, (*viz.*) that the children should have all alike, which they cannot have if they are not *jointenants*. *Secondly*, The words *equally to be divided*, doth not make them *tenants in common;* because, as tenants in common they must be seised *pro indiviso*, as to the possession, whereas those words divide their tenancy and possession, and whenever the estate comes to be divided, they cease to be *tenants in common;* therefore it is absurd to say, that those words create an *estate in common*. And lastly, *jointenancy* is favoured in law, which neither loves fractions or divisions of estates; but if this was a *tenancy in common*, then the tenements and tenures would be multiplied, for here would be five copyhold estates, and five fines to the lord of the manor, instead of one before.

Yelv. 23. Dyer 10.

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14. PULLEN *v.* PALMER.

[Trin. 8 Will. 3.]

5 Mod. 71, 159. Carth. 328. One jointenant may distrain, but cannot avow alone. Vide 1 Salk. 390.

IN *replevin* for taking several cattle, the defendant avowed in his own right, for that *W. R.* was seised in fee of, *&c.* and granted a rent-charge to *A.*, *B.*, and *C.*, and ten more, who granted to the defendant *and to twelve more;* and that four of the said thirteen are since dead, and *nine alive*, of whom he is one; and that for one year's rent, due at such a time, he distrained: Upon a demurrer to this plea it was objected, that the defendant ought not only to justify in his own right, but that he ought likewise to make conusance as bailiff to the rest, who are living: *Et per Holt*, Ch. Just. One jointenant may distrain, but he cannot avow solely, and therefore this avowry must abate, because it is always upon the right, and the right of this

rent is in all of them; and therefore the Court cannot adjudge the right of the *retorn. habend.* to one alone; for which he (the defendant) ought to have made conusance, as bailiff to the rest; and this is like a * repleader, where the defendant may avow *de novo*. Tenants in common may join or sever in debt, but they must sever in avowry, for the reason before-mentioned (*viz.*) because it goes to the realty; and therefore, if three tenants in common distrain thirty beasts, one of them must avow for ten, the other for ten, and the third for ten more. But *per Curiam*, † The husband may distrain for rent due to his wife, and avow for it alone, because the right of the rent due is in him alone.

* Inst. 146. a.

† 2 Cro. 282.

15. The essential difference between *tenants in common* and *jointenants* is, that *tenants in common* hold their lands either by several titles or several rights, but *jointenants* hold them by one title and by one right; but there is no difference between them as to the possession, and the manner of taking the profits.

The difference between tenants in common and jointenants.

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16. *Tenants in common* were not compellable at common law, before the statute, to make *partition*, no more than jointenants; and *per Holt*, Ch. Just. in suing out a writ of partition, the party never shews whether he is a tenant in common or jointenant.

Tenants in common not compellable to make partition. Co. Ent. 413.

ISSUES JOINED.

1. IN *replevin* the defendant avowed for rent arrear upon lease made to him 1 *Octob.* 11 *Regis apud F.* The plaintiff in bar replies, that the avowant did not make the lease to him on the said 1 *Octob.* 11 *Regis apud F.* in manner and form, *&c.*; and upon a demurrer to this replication, *per Curiam*, *the day and place* are here made part of the issue, whereas they are not material, for a demise at any other time and place would be sufficient; he should have replied, *non demisit modo & forma.*

2 Lev. 12. Where the day and place is made part of the issue, it is not good. See postea 6. 2 Saund. 317.

2. In covenant upon a lease, the breach assigned was for *non-payment of rent;* the defendant pleaded *nil debet;* adjudged upon a demurrer to be an ill plea.

3 Lev. 270. In covenant, &c. where nil debet is no good plea. Vide Com. Pleader, 2 V. 14.

3. The plaintiff sued as administrator; the defendant pleaded, that *W. R.* was administrator, and yet alive; the plaintiff replied, THAT *W. R.* WAS NOT ALIVE, and con-

1 Vent. 213. There must be a negative and affirmative to make an issue.

cluded to the country; and upon a demurrer to this replication, it was adjudged ill, for though the matter is contradictory, yet there must be a negative and an affirmative to make an issue.

Raym. 98. Where the plea, hoc paratus est verificare, is not good. Vide Str. 871. Doug. 95. n. (92.)

4. Debt upon bond conditioned to pay all such sums as should be expended in such a matter; the defendant pleaded payment, *& hoc paratus est verificare;* the plaintiff replies non-payment, *& hoc paratus est verificare;* and, upon a demurrer to this replication, it was adjudged ill, for he ought to have *concluded to the country.*

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1 Saund. 112. where hoc paratus est verificare is a good plea.

5. In debt upon bond conditioned to render an account of all such goods of *W. R.* as came to his hands; *upon oyer* the defendant pleaded, that no goods of *W. R.* came to his hands, and averred his plea; the plaintiff replied, that a *silver bowl* of *W. R.'s* came to his hands, and he likewise averred his replication. *Et per Curiam,* It is well concluded, for the matter is * new; but if it had been expressed in the condition, then he ought to have concluded his replication, *& hoc petit quod inquiratur, &c.* But here it was out of the condition, and perhaps the defendant may have new matter to rejoin; as, that the bowl was given to him, *&c.* But 1 *Sid.* 341. is denied to be law.

* Postea 10.

6. YATES *v.* HARLAKENDEN.

[9 Will. 3. B. R.]

See Antea 1. Where the whole time is put in issue. Vide Bull. N. P. 299. Espinasse 790.

IN *covenant* against an *apprentice;* the breach assigned was, that he (the defendant) *penitus decessit* from his service at such a time, *& abinde continue to such a time;* the defendant pleaded, that he did not depart from his service, and *continue from it as the plaintiff* had alleged; to which plea the plaintiff demurred, because the *whole time* being put in issue, the defendant ought to have pleaded, he did not continne out of his service for the time alleged in the declaration, nor for any part thereof.

Holt, Ch. Just. In a general issue, as waste for cutting twenty trees, the defendant must plead, that he did not cut the said twenty trees, *nor any of them;* but it is otherwise in a *collateral issue;* as for instance, in an action of debt, upon a bond conditioned not to commit waste, and the breach assigned, that he did commit waste in cutting down twenty trees, it is sufficient for the defendant to plead he did not cut twenty trees *modo & forma,* as the plaintiff hath alleged, for in such case he is only to meet with his adversary; but upon the evidence, if it appear that he cut down one tree, the plaintiff shall have a verdict.

3 Cro. 84. Dyer 115. B. 1 Inst. 282.

7. HALL v. STICH.

[5 Will. 3. B. R.]

IN *ejectment* for lands in the *county palatine* of *Durham*; Upon not guilty pleaded, the plaintiff had a verdict; and upon a writ of error brought, the error assigned was, that there was no issues joined between the parties, for the words *super patriam* were left out; but *per Curiam*, Here is an affirmative and a negative, and that makes an issue; it is true it had been better if those words had been in, but the omission of them only makes the issue informal; so they affirmed the judgment.

Where the words super patriam were left out, the issue is only informal, there being an affirmative and negative before.

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8. SKINNER v. KILBY.

[Mich. 1 Will. 3. Intratur. Trin. 1 Will. 3. Rot. 833.]

IN *covenant*, the plaintiff assigned a breach, in *non-payment of rent*; the defendant pleads, that *he paid it*, & *hoc paratus est verificare*; and, upon a demurrer to this plea, it was adjudged ill, because it was an affirmative to what went before, for that was a negative (*viz.*) in *non-payment* of rent, and therefore the defendant ought to have concluded to the † country, for otherwise pleadings would be infinite.

Where hoc parat' est verificare is not good. Carth. 88.

† Yelv. 138. Cro. Car. 164.

9. ALLEN v. SYMMS.

[Trin. 6 Will. 3. Rot. 299.]

INDEBITATUS assumpsit against *Richard Symms*, who pleaded *quod ipse idem Richardus versus quem*, &c. is called *Richard Symonds*, and *traversed* that he is called *Richard Symms*, & *hoc*, &c. The plaintiff replied, that the defendant was called and known as well by one name as by the other, & *hoc paratus est verificare*; and upon a demurrer to this replication, *per Curiam*, the defendant may well enough say, that *ipse idem Richardus* is called *Richard Symms*, for he may own his christian name, and plead a *misnosmer* to his surname.

Where one affirmative is in answer to another, it ought to be averred, and not to conclude to the country.

But in this case all is discontinued by the plaintiff's replication, because he averred his plea, when he ought to conclude to the country. *Sed per Curiam*, Where one *affirmative* comes in answer to another *affirmative*, in such case it ought to be averred, and not conclude to the country; but it is otherwise where an *affirmative* comes in answer to a *precedent negative*; therefore in this case the

defendant having added a *traverse* to his plea, the plaintiff ought to have concluded his replication to issue, (*viz.*) * to the country; for in pleas the traverse is as a negative, and every general negative must conclude to the country; so that in this case the *misconclusion of the replication had made a discontinuance.*

* Dyer 353. 2 And. 6. Yelv. 138. Thomp. Ent. 1. No. 4. Rast. Ent. 515, 516.

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10. LODER *v.* LODER.

[Mich. 2 Will. 3. B. R. Rot. 506.]

Where there is an affirmative to a negative; yet if the matter is new, it needs not be concluded to the country. Doug. 60. (430.) 2 T. R. 439, 576.

DEBT *upon bond* against an *administrator cum testamento annex'*; the defendant prayed *oyer* of the condition, which was, that *W. R.* should not revoke his will, and pleaded, that the said *W. R.* did not revoke his will; the plaintiff replied, that after the said will the said *W. R.* made another will, and thereby he did revoke the first will, *& hoc paratus est verificare;* and, upon a demurrer to this replication, it was adjudged, that though this is an affirmative to a precedent negative in the plea, yet the plaintiff needs not conclude to the country in his replication, but aver it as he had done, because in the replication * new matter was suggested, and therefore he ought to conclude *& hoc paratus est verificare.*

* Antea 5. S. P.

11. WATTS *v.* WEST.

[Pasch. 12 Will. 3. 1 Ld. Raym. 674. S. C. Holt 559.]

Where there is a plea in abatement, or the general issue is pleaded, if not entered, the defendant may waive it. Post. 274. S. C. Vide 1 Cromp. 168.

ACTION against the *mayor* for a false return, *&c.;* the practice was agreed to be, that where the defendant pleads the *general issue* and it is not entered, he may within *four days of the term* waive that issue and plead specially, and if *Sunday* happen to be one of the *four days*, then *Monday* shall be allowed; so likewise where the defendant pleads *in abatement*, he may at any time after waive the special matter and plead the general issue, unless there is a rule made for him to plead as he will stand by it.

12. MARCKAR *v.* HARRIS.

[Mich. 4 Will. 3.][e]

Where nil habuit in tenementis is the issue, the title needs not be set forth. Post. 302. 2 Ventr. 252. 4 Mod. 78.

IN an action of *debt for rent;* the defendant pleaded, that the plaintiff *nil habuit in tenementis;* the plaintiff replied, that he was possessed of the tenements by virtue of a lease for forty years, made to him by the Lord *Wotton*, who had power to demise the same; and, upon a demur-

ter to this replication, it was adjudged good, without setting forth the title, for *nil habuit in tenementis* is the issue; and the plaintiff may reply, *quod satis habuit in tenementis*, (*viz.*) in fee or tail, *&c.;* and at the trial evidence may be given of any other estate, because the particular estate alleged in the pleading is only form, where the issue is *nil habuit in tenementis*.

JUDGMENT.

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1. A *JUDGMENT* shall have *relation* to the first day of the term, as if it was given on that very day, unless there is a *memorandum* to the contrary, as where there is a *continuance* of the cause till another day in the same term; *per Holt*, Ch. Just.

Judgment shall have relation to the first day of the term. 1 Bul. 35. Com. Dig. Temps C. 7.

2. In trespass for taking a gelding, the defendant pleaded, that in such a county court, *coram *sectatoribus ejusdem curiæ per considerationem curiæ debito modo recuperavit versus præd'* the plaintiff 4*l. tam occasione cujusdam insultus & transg. eidem defenden' per prædict'* the plaintiff, and such a one his wife *illat'*, *quam pro mis. & custagiis, &c.;* and, upon a demurrer to this plea, it was adjudged ill, because here was a judgment in an inferior court pleaded without any *plaint* levied; and because the names of the *suitors* are not set forth (*a*), and the judgment is pleaded as obtained against the *husband*, when the action was brought against *husband and wife*.

2 Lutw. 1352, 918.
*The names of the suitors ought to be set forth.
Judgment pleaded in an inferior court without any plaint levied, ill. Vide 1 Wils. 316. 2 Vent. 100. Com. Pleader E. 18.

3. After a rule to sign judgment, there ought to be four days before the judgment is signed, and those four days are computed exclusive of that day on which the rule was made, and of that on which the judgment was signed; and this is because the party may have a reasonable time to bring a writ of error, if he think fit so to do; but in the Common Pleas they stay till the *quarto die post* without any rule, but that day is inclusive in that court.

After a rule to sign judgment there must be four days exclusive. Vide 1 Salk. 399. Cromp. Prac. 300.

4. *Assumpsit* upon two several promises; one was found for the plaintiff, and the other for the defendant, and judgment for the plaintiff as to one, and *nil capiat, &c.* as to the other; *sed sit in misericordia*, the defendant brought a writ of error, and assigned for error the omis-

Judgment cannot be affirmed for part, and reversed for part.

(*a*) This would be aided by a verdict. *Carth.* 86.

*See 2 Cro. 349. Jacob v. Mills. But that case is since denied to be law. Allen 75.

sion of the words *cat inde sine die; Et per Curiam*, *The judgment shall be reversed for the whole, because it being an entire thing cannot be reversed for one part and affirmed for the other part.

Warrant of attorney not to be signed by a person in custody, unless an attorney is present. Postea 14. Vide 1 Salk. 402. 3 Bur. 1793. 1 Str. 530. 2 Str. 902, 1245. Barnes 52.

5. *Regula. Pasch.* 15 *Car.* 2. *B. R.* It was ordered by the Court, that an officer shall not take any warrant to confess a judgment of any person in his custody, unless an attorney for the defendant is present, and subscribes his name to such warrant.

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6. BANBURY'S *CASE.*

[Hill. 6 Will. 3. B. R.]

Every judgment must be both complete and formal.

PER Holt, Ch. Just. Every judgment must not only be complete, but also formal; therefore if a *quo warranto* is brought against the defendant for usurping *royal franchises*, and the Court should give judgment that he has no title, yet unless they go on and say, *quod abinde excludatur*, it is ill: So in debt upon a bond, if the defendant plead *auterfoits acquit* in an action upon the same bond, and the judgment was, that he (the defendant) should recover damages, **& cat inde sine die*, that is naught without saying further, *quod querens nil capiat per billam*, because *dismission* is no judgment in a court of law: And *per Holt*, Ch. Just. If trespass is brought for a trespass done in lands belonging to such a house, though it appear at the trial that the plaintiff had no title to the house, yet the Court cannot give judgment to turn him out, because it was not judicially before them.

*1 Vent. 27, 39. See Jacob v. Mills, 2 Cro. 349.

7. MORRICE *v.* GREEN.

[Pasch. 11 Will. 3. B. R.]

What is a judgment by nihil dicit.

IN this case it was held, that a judgment by *nihil dicit* is where one is in court, and required to make answer to what is objected against him, but he is silent and says nothing in his defence.

Departure in contempt of the Court.

8. There is likewise a judgment for departing in despite of the Court, and that is where the party appears, and, being to attend that day, goes out of the Court without leave of the Court; as in *common recoveries*, where the common vouchee comes in and pleads *nul tort, nul disseisin*, and then the demandant imparls generally, and not to a day certain; and for that reason the vouchee is still obliged to attend the Court, but doth not; then the

entry is, *postea eodem die revenit* the demandant, and because the vouchee is not there but is departed, therefore the demandant hath judgment.

9. .. And lastly, There is a judgment by *default*, and that is where the party hath a day certain, and is demandable, and being demanded doth not appear, whereupon judgment is given against him by default; and these are distinct judgments, which cannot be used the one for the other. See *Co. Entr.* 269. *a. Rast. Ent.* 173. *b.*

What is a judgment by default.

10. ANONYMOUS.

[Mich. 10 Will. 3.]

UPON a motion to stay execution on a judgment, upon pretence of an agreement since the judgment entered: *Per Holt*, Ch. Just. Where the judgment itself was confessed and entered upon terms, the Court will lay their hands on it and see it performed, because it is no more than a conditional judgment at first; but where the judgment is absolute at first, there the party shall be put to his action upon any subsequent agreement concerning it, or may bring an *audita querela*, for the Court will not stay execution upon a motion; and in this case the Chief Justice said, that he did not pretend to dispense equity at large, but only by the consent of the parties, upon a rule of Court.

Where execution shall be stayed on a motion, where not

11. KERLE *v.* CLIFTON.

[Trin. 1 Will. 3. B. R.]

UPON a writ of error in *B. R.* to reverse a judgment in *C. B.*, the defendant in error pleaded a *release* of errors; and upon a demurrer to this plea, it was doubted what judgment should be given, for the first judgment being erroneous, the Court could not affirm it: *Sed per Curiam*, a *nil capiat per breve* shall be entered.

Upon a writ of error, &c., defendant pleaded a release of errors, the judgment shall be nil capiat per breve. Sho. 50. Str. 127, 683.

12. WESTERN *v.* CRESWICK.

JUDGMENT against the defendant in an action of debt on a bond, and upon a *fieri facias* directed to the sheriff he took some of the defendant's goods and sold them, afterwards this judgment was (*a*) [*reversed*]; and upon a motion to bring the money into court for which they were sold, or to pay it to the defendant himself, the Court will make no rule, for the goods might be sold for less than they were worth; therefore the defendant may bring an action of trespass, if the plaintiff doth not agree with him.

4 Mod. 161. Goods were levied by a fi. fa., and sold, and afterwards the judgment was set aside for irregularity. Vide 2 Salk. 588. 1 Cromp. 371.

(*a*) *Set aside.*

13. DAVENANT *v.* RAFTER.

No material difference between costs and damages.

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JUDGMENT in *C. B.* by *nil dicit*, and upon a writ of error in *B. R.*, the error assigned was for want of an original; the defendant in the writ of error pleaded a *release of all errors;* the plaintiff replied, that the release set forth by the defendant recited a judgment obtained by him for 600*l.* debt and damages, *ultra mis' & custagia*, and that this release was of errors in that judgment; but the judgment on which the writ of error was now brought, was *for* 600 *l. debt and damages only*, and therefore this must be another judgment; and if so, then the errors in such judgment are not released. *Sed per Curiam* in *C. B.* If the judgment is by confession, it is always there entered *pro debito et damnis*, without any further addition; but in *B. R.* it is entered *tam pro debito & damnis, quam pro mis' & custagiis;* but between damages and costs there is no material variance, for damages include costs.

14. STANDFAST *v.* CHAMBERLAINE.

5 Mod. 205. Antea 5. S. P. Judgment signed four days after the return of the postea.

IN ejectment, the plaintiff had a verdict at the assizes; *per Curiam*, the judgment ought not to be signed till *four days after the return of the postea*, which happened to be on the *6th of May*, and on that very day the judgment was signed; but the plaintiff did not take out execution till two days after the signing the judgment, so that the defendant had time enough either to bring a writ of error, or to move in arrest of judgment; yet because it was signed on the fourth day after the return of the *postea*, when that day ought to be *exclusive;* it was adjudged to be irregular, and therefore the judgment was set aside, and the party had restitution.

JURISDICTION.

How the jurisdiction of ecclesiastical courts arises.

THE jurisdiction of *ecclesiastical courts* arises either as incident or principal; and then it is either from the nature of the thing, as causes *matrimonial and testamentary*, or from the person, as *beating a clerk*, or from the place, as *scolding in the church-yard*, *cutting trees there*, or contemptuous words spoken in court.

2. In some causes the spiritual and temporal courts have a concurrent jurisdiction; as where a man is entitled to a *pension* by *prescription*, he may sue for it in either court.

Where both courts have a concurrent jurisdiction.

*3. Now, as to pleading a jurisdiction, it hath been adjudged, that where an *indebitatus assumpsit* was brought in *Durham pro mercimoniis venditis*, without saying *ibidem* this is good; for a court of a *county palatine is an original superior court*, and therefore it shall be intended, that the contract was made within the *jurisdiction*, though it is not set forth in the declaration; for nothing shall be intended out of the jurisdiction of a superior court but what specially appears to be so.

1 Saund. 14. 1 Sid. 330. What shall not be intended to be out of the jurisdiction.

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4. So where matter of *aggravation* is not laid to be within the jurisdiction of any inferior court; yet if the cause of action be laid to be *infra jurisdictionem*, it is well enough.

Sid. 342. Where the cause of action is laid infra jurisdiction'.

5. Case for words *per quod* she *lost her marriage*, if the speaking be laid within the jurisdiction, and not the loss of marriage likewise, it is ill, because that is the cause of action; otherwise, if the words had been actionable in themselves.

Ray. 63. 1 Lev. 69, 153. Sid. 86, 95. Where words must be laid to be spoken infra jurisdictionem.

6. In all *assumpsits* the consideration must be laid to be *infra jurisdictionem*.

Sid. 105. In all assumpsits it must be infra jurisdictionem.

7. An agreement was made within the jurisdiction of the *Marshalsea* to carry goods to *York*, *an assumpsit* will not lie in that court, as upon *an agreement to carry goods to York*, because the *carrying* is out of the jurisdiction of that court; but the plaintiff may declare generally, that the defendant being indebted to him for carriage, he promised to pay, so nothing will appear to be out of the jurisdiction.

1 Vent. 100. Where an assumpsit will not lie for carrying goods extra jurisdiction'.

8. Case lies against the plaintiff for suing him in an inferior court, where the cause of action arises out of its jurisdiction.

1 Vent. 73. Cases for suing in inferior court

JUSTICES OF PEACE.

1. THE QUEEN v. BURNABY.

[Trin. 3 Annæ, 2 Ld. Raym. 900. S. C.]

1 Salk. 181.
* 27 Eliz. c. 7
† 3 Cro. 821.
5 Rep. St. John's case. Where property is in question, the justices have no jurisdiction.

UPON a *certiorari*, a conviction before two justices for cutting down several lime-trees in the * night-time, being removed into *B. R.* the defendant offered to plead, that he had † *a title to the trees*, but three of the judges would not admit the plea; for if the justices had no jurisdiction, as they had not, if *property* had been the question before them, then an action lies against those justices, and against him who executes their order; but if they had jurisdiction, then *B. R.* hath not power to question their judgment, therefore this would be altogether new, and without precedent. But *Holt*, Ch. Just. held that *St. John's case* was a precedent; and though the roll could not be found, yet it was and must have been done so in that case, otherwise the point could not have come in question; that it is as reasonable to falsify the proceedings of the justices by this plea, as it is by action to be brought against them; that if *B. R.* confirms this order, then no action will lie against him who executes it, because he acts by the authority of this Court, and that there could be no reason for him to give an authority and aid a *fiat* to a thing which ought not to be done: But this conviction was set aside for another reason, (*viz.*) because the *number and nature of the trees* were not expressed. As to the objection, that they were so small they could not be numbered, the answer was, if they cannot be numbered, then it ought to set forth so many *bundles*, *faggots*, or *loads*, for the number or quantity ought to be certain in this case, as well as in an action of trespass, because that is to be the measure of the damages; and if that had been done, then this conviction would have been a good plea in bar to an action of trespass for the same cutting.

JUSTIFICATION.

1. MATTER of *justification* can never be given in evidence, but where it cannot be *pleaded;* therefore *in trespass* upon not guilty pleaded, *son assault demesne* cannot be given in evidence; but it is otherwise in an *indictment for murder, &c.*

Matter of justification cannot be given in evidence, but where it cannot be pleaded.

2. In trespass for entering his close, treading down his grass, and *feeding his cattle there;* the defendant pleads, that *W. R. had common there,* and appointed him (the defendant) to look after his cattle, and that he entered to see them, *quæ est eadem transgressio;* and, upon demurrer to this plea, it was adjudged ill; for the defendant justified his entry only, and not the *feeding,* and a man cannot *justify* a trespass unless he *confess* it; but here the defendant did not confess it, therefore the plea being entire, the justification is bad for the whole.

1 Saund. 27. Where a man cannot justify a trespass, unless he confess it.

3. In trespass for an *assault, beating,* and *wounding,* and *evil entreating;* the defendant as to the *wounding* pleads not guilty, and as to the residue, that being *churchwardens,* the plaintiff sat in the church with his hat on his head, and they pulled it off, *quæ est eadem insult', verberatio & maletractatio;* this was adjudged no *justification,* because nothing was said as to the *beating, tamen quære,* for *trespass to the person* imports a *beating,* but it seems rather to be an assault.

1 Saund. 14. The justification must go to the whole. 4 Co. 62. a. mar. pl. 47. 2 Cro. 27. 2 Mod. ca. 330.

4. *Trespass quare vi & armis* he insulted and beat the plaintiff, and *took and imprisoned* him; the defendant as to the *force, assaulting,* and *beating,* pleads not guilty; as to the taking and imprisoning him he *justifies* under a *process* to arrest him: This was adjudged ill, because repugnant, for the defendant having denied any assault and battery, afterwards confesses it, by justifying the taking.

2 Lutw. 932. Where the justification is repugnant. 1 Roll. 176.

5. *Trespass* for beating his servant *per quod servitium amisit;* the defendant justifies the battery, but said nothing as *to the loss of the service;* and, upon a demurrer to the plea, it was insisted, that was the principal matter to which the defendant had not given any answer. *Sed per Curiam,* the loss of the service is the consequence of the battery, and that being justified, is a sufficient answer to the rest.

1 Roll. Rep. 331. Justification to part, good. Tho. Ent. 390.

6. SWINSTED *v.* SMITH.

[Mich. 8 Will. 3. B. R.]

* 1 Salk. 408. Justification where it is good for part.

THIS case is reported in * 1 *Salk.*, by the name of *Swinstead* versus *Lyddall.* It was an action of *trespass* for an assault, *battery*, and *false imprisonment*, and for keeping and detaining the plaintiff, *quousq. he paid the defendant* 11*s.* The defendant justified under an *order of the Court of Conscience, &c.*, by virtue whereof he took and imprisoned the plaintiff, and detained him *until he paid* 10*s.* 4*d.*, *&c.* And, upon a demurrer to this plea, it was objected, that it did not answer the declaration, for that was for detaining the plaintiff, *quousq. he paid* 11*s.*, and the plea is, that he detained him, *quousq. he paid* 10*s.* 4*d.*; so where a man declares in an action of trespass for taking *eleven sheep*, it is no answer to justify the taking *ten of them;* so likewise, if the plaintiff declare for falsely imprisoning him *for three days*, it is no answer to justify *for two days:* But on the other side it was argued, that the *gist of this action* was for the false *imprisonment*, as in trespass for taking his horse, and *immoderately riding him;* the defendant justified the *taking* by the plaintiff's leave, but said nothing to the *riding;* and, upon a demurrer, that was adjudged a good plea, because the *gist* of the action was the *taking* the horse, and the immoderate riding was only an aggravation of the trespass, and this was *Bringlo* and *Morris's* case, *Hill.* 27 *&* 28 *Car.* 2. *B. R. Et per Holt*, Ch. Just. in the principal case; the *quousq.* is only an aggravation, for the action was not brought for *taking the* 11*s.*, but for the *false imprisonment and detaining the plaintiff quousq., &c.:* as in trespass for taking three sheep, every sheep is the cause of the action, (*viz.*) part of the cause, and so for imprisoning the plaintiff *for three days;* and therefore the taking every sheep and imprisoning for every part of the time must be answered: It is true, if the plaintiff had been to pay 10*s.* 4*d.* only, and that after it was paid, the defendant detained him till he had paid 8*d.* more, that might have been material; but then the plaintiff should have set forth this matter in † a replication; so this was adjudged a good plea.

† Moor 704. 2 Saund. 5. Sid. 472. 3 T. R. 292. 1 Lev. 31.

7. SHEPPARD *v.* TAILOUR.

Justification under a judgment in a court-baron, ill.

IN *replevin* for taking *six dishes*, the defendant justified under a judgment in a *Court Baron*, and a *levari facias* awarded, by virtue whereof he took the *dishes;* and, upon a demurrer to this plea, it was adjudged to be ill, because the

execution upon a judgment in a *Court Baron* ought to be by *distringas*, *and not by *levari facias*, unless there is a special custom to warrant it; besides, the defendant should not have begun his plea with the judgment, but should have gone on gradually, (*viz.*) he should have shewn that there was a *plaint* levied, *&c.*, and *taliter processum fuit superinde*, that a judgment was obtained, *&c.*

1 Wils. 316. 3 Lev. 404. Com. Pleader, 3 M. 24. 1 Salk. 107.

8. FREEMAN *v.* BLEWITT.

[Hill. 12 Will. 3. 1 Ld. Raym. 632. S. C.]

RULED *per Holt*, Ch. Just. in this case, to which the Court agreed, That in trespass, if the sheriff or other principal officer justifies by virtue of a *capias* or any returnable writ, he must shew that the writ was returned, but not if he justifies under a *replevin* or an *alias replevin*; for these are not returnable writs, but a *pluries replevin* is returnable; for the writ commands the sheriff to replevy the goods, *vel causam nobis significare;* therefore he must return the writ, otherwise this inconvenience might happen, (*viz.*) that if the defendant should appear and be nonsuit (for he is the first actor) the Court would be at a loss how to give judgment, whether *pro retorn' habend'*, or a *capias* in *withernam*, or a mere nonsuit.

1 Salk. 409. Where any officer justifies under a returnable writ, he must shew that the writ was returned.

9. SEARLE *v.* BUNNION.

IN *trespass &c.* The defendant pleaded, that he was *possessed* of the *locus in quo*, *&c.*, and so justified the taking the cattle *damage-feasant;* and, upon a demurrer to this plea, it was objected that it was ill, because it is not sufficient for him to say generally, that he was *possessed*, *&c.*, for in pleading he ought to shew the commencement of his term: *Sed per Curiam*, where trespass is brought, and the defendant will justify by virtue of any **particular estate*, there he must shew the commencement of such estate or title; but where the matter of justification is collateral to the title to the land, (*viz.*) where the title can never come in question; there such a justification as in the principal case, is good.

2 Mod. 70. Where a man may justify on his possession without shewing a title. Vide 2 Salk. 643. 4 Mod. 419.

*Yelv. 75. Cro. Car. 138. 3 Mod. 132. Lutw. 1492.

LAWS.

Rel. Spelm. 8.

1. THE *Saxon laws* were all unwritten, till *Ethelred*, the first Christian king, published them in writing.

Seld. on Fortescue, cap. 17. par. 7.

2. And those laws had a mixture of the *British customs*, and the *Danish laws* had a mixture of both; but *William, called the Conqueror*, made a new model of them, for some he approved and some he rejected; and added more, of which there was a copy in *Rowland Abby*, under this title, *ce's sant leges & les customes que le roy William grantoist a tout le people de Angleterre apres le conquest de la terre icy, &c.*

3. Mr. *Seldon* tells us, that the *Roman laws* were in use in *Britain*, for they had several *colonies* here, and each of these *colonies* were governed according to the *Roman laws;* but compares them to a ship, which, by long and frequent mending, had nothing left of the first materials of which it was made.

3. And as to that question, When and how began our common law? he tells us, it is a trivial question, and that it began as the laws of all other states, (*viz.*) when there first began to be a state in the land.

5. *Laws* are divided into *arbitrary or natural laws;* the last of which are essentially just and good, and bind every where and in all places where they are observed.

6. *Arbitrary laws* are either concerning such matter as is in itself morally indifferent; in which case both the law and the matter and subject of it is likewise indifferent, or concerning the natural law itself, and the regulating thereof.

7. Now all *arbitrary laws* are founded in convenience, and depend upon the authority of the legislative power which appoints them, and both are for maintaining public order.

8. Those which are *natural laws* are from *God;* but those which are arbitrary are properly humane and positive institutions.

9. Upon the whole, we may consider the world as one universal society; and then that law by which nations are governed, is called *jus gentium*, if we consider the world as made up of *particular nations;* then the law which regulates the public order and right of men is called *jus publicum;* and that law which regulates the private right of men is called *jus civile.*

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LEASE AT WILL.

1. LAYTON *v.* FIELD.

[Hill. 13 Will. 3. B. R. Vide 2 Salk. 413.]

PER Holt, Ch. Just. Where a lease is made at will, the lessee, after a quarter of a year is commenced, may determine his will, but then he must pay that quarter's rent; and if the lessor determine his will after the commencement of a quarter, he shall lose his rent for that quarter: But if a lease be made from year to year, *quamdiu ambabus placuerit;* in such case, after a year is commenced, neither the lessor or the lessee can determine their wills for that year, because they have willed the estate certain for so long time.

Lessee at will cannot determine his lease after a quarter of a year commenced, without paying that quarter's rent.

2. GERMAIN *v.* ORCHARD.

[Trin. 6 Will. 3.]

THE case was, *lessee for years* of lands granted the *said lands* to *W. R.*, his executors, administrators, and assigns, *habendum* to him and to his executors, *&c.*, *after the death* of the grantor and his wife: Adjudged, that by the *grant of the lands* generally, the grantee is tenant only at will to the grantor, that being estate enough to satisfy the grant; for it doth not appear that by a grant of the lands the grantor intended to pass his whole interest and term: But this judgment was reversed in the Exchequer-chamber; and there it was held, that if *A.* is possessed of Black-acre for a term of years, and grants it to *W. R.* (not saying, and to his executors, nor for what term and interest,) in such case *W. R.* is only tenant at will to the grantor; but if he devise Black-acre to *W. R.*, the whole estate passeth; for if it should be an estate at will, it would either never begin, or determine as soon as it begins.

1 Salk. 346. Lessee for years grants the lands to W. R. habend. to him and his executors after the death of K. K. the lessor and his wife, his whole interest passed.

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3. ANONYMOUS.

[Pasch. 4 Annæ, B. R.]

PER Curiam, *obiter*, it was held. That a grant or authority to come upon my lands, and to hunt there, is but a *license*, and no more; but if it is to take the profits, it is a

Difference where there is an authority, and where an interest.

lease at will; so if it is to take the profits for a year, it is a lease for a year, for this passes an interest; the other is only an authority to do particular acts (*a*).

(*a*) This is part of what is said *per Curiam*, in the *Queen* and *Winter*, 2 *Salk*. 587.

LEGACY.

Legacy is suable in Spiritual Court.

1. THE cognizance of a legacy properly belongs to the Spiritual Courts, for such bequests were not good at common law, the rule being *post mortem tunc tua non sunt*.

Sid. 44. Where it is payable out of lands, the remedy is in Chancery.

2. But this must be understood where a legacy is devised generally; but if it is payable out of the land, or out of the profits of the land, an action of the case lies at common law, but the usual remedy is in Chancery.

Where an executor is not bound to pay a legacy.

1 Ch. Rep. 257.

3. The testator being possessed of *several leases*, devised them to his wife for life, remainder to his son for life; and he owing several debts, the wife paid as far as the goods and personal chattels went, and assented to the legacy, and died, there being several debts still unpaid; then her executor articles with those creditors to convey a lease to them, and they exhibit a bill in equity against the executor and the son, to have a conveyance, and the *Lord-Keeper Finch* decreed a conveyance; for first, an executor is not bound to pay a legacy, unless he hath security given to refund, if there are debts; and the reason is, because a legacy is not due till the debts are paid, for a man must be just before he is charitable; and therefore, if a legacy is paid, it remains still in the hands of the legatee as a legacy; but if the legatee alien *bona fide*, the creditor is defeated, for he had a title, and the purchaser shall not be prejudiced by this trust for creditors: Now in the principal case, an assent to a legacy will not do any more than an actual payment would have done.

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1 Ch. Rep. 198. Martin v. Clerk.

4. A sum of money devised to *W. R.*, to be disposed as the testator should appoint by a *private note*; now, if there was no such note or appointment, then it is a legacy to *W. R.* himself.

Moor 713.

5. Legatee of a term must not plead that it was devised to him, and that he entered; but that he entered by assent of the executor, or *virtute legationis*.

LIBEL.

1. THE KING *v.* ALME & NOTT.

[Trin. 11 Will. 3. B. R. 1 Ld. Raym. 486. S. C. called The King *v.* Orme and Nott.]

INDICTMENT for a libel against several subjects, *&c.* to the jury, unknown. *Et per Curiam*, Where a writing which inveighs against mankind in general, or against a particular order of men, as for instance, men of the gown, this is no libel, but it must descend to particulars and individuals to make it a libel.

What shall make a libel, what not. 2 Wilson 403. 2 Hawk. ch. 73. s. 9.

2. THE QUEEN *v.* DRAKE.

[Mich. 5 Annæ, B. R.]

INFORMATION against the defendant, setting forth, that he being evilly disposed, *&c.* did make a libel intitled *Mercurius*, containing divers scandalous matters *secundum tenorem sequen'*, and so set forth some *paragraphs*, and in one of them there was the word *nec* instead of *non*, so that it was not literally the same as in the libel; however it did not alter the sense; but upon not guilty pleaded, this *variance* being perceived at the trial, the counsel for the defendant insisted, that it might be found specially, which was done; and afterwards, upon arguing this special verdict, judgment was given for the defendant: It was objected against him, that this variance was immaterial, and that in every action for words the plaintiff usually declares, for speaking *hæc Anglicana verba sequentia;* but it is not necessary to prove every word; therefore to make every literal omission or variation fatal, would be to make this action impracticable. But *per Curiam*, The * *tenor* is the transcript copy of some original, to which it may be compared, and therefore there can be no *tenor* of words spoken, because there is no written original; but there may be a *tenor* of a writing, which word always imports a true copy of the thing written, and consists in *identity*. *Et per Holt*, Ch. Just. A libel may be described either by the sense or by the words; and therefore an information charging, that the defendant made a writing, containing such words, is good; and in such case a nice exactness is not required, because it is only a description

1 Salk. 660. Information for a libel differing in one word from the libel itself, not good.

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* Postea 5. S. P.

of the sense and substance of the libel. But an information, charging the defendant with making a writing *secundum tenorem sequentem*, there the written libel, and that set forth in the information, must exactly agree, because every word in the information is a mark of description of the very libel itself; so in trespass, *quare clausum fregit*, *&c.* if the plaintiff sets forth the *buttalls* and boundaries of his close, and fails in the proof thereof, he cannot recover; because he is obliged to prove his description; and there is no difference between wrongs done by words and by things.

Dyer 203. 3 Cro. 503. 2 Cro. 407. Hob. 129. Yelv. 46, 152. 5 Rep. 53. Cro. Car. 328. 2 Saund. 121. Co. Ent. 508.

3. Words are transient, and vanish in the air as soon as spoken, and there can be no *tenor* of them, as hath been already observed, and therefore an identity is not required; and though the jury find some omissions, it will be sufficient if some be proved, and in such case the plaintiff shall recover; but when a thing is written, though every omission of a letter may not make a variance, yet, if such omission makes a word of another signification, it is fatal.

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4. CROPP *v.* TILNEY.

[Mich. 5 Will. 3. B. R.]

Innuendo, where good.

UPON a writ of error on a judgment in an action on the case, wherein the plaintiff declared that he stood to be elected for a *member of parliament*, and that the defendant caused a *libel* to be printed of him with these words, as spoken by the plaintiff (*viz.*) *There is a war with France, of which I can see no end, unless the young gentleman on the other side of the water* (*innuendo the prince of Wales*) *be restored*, *per quod*, he lost his election, *ad damnum*, *&c.*, there was a verdict for the plaintiff, and judgment in *C. B.*; and now, upon a writ of error in *B. R.*, it was insisted, that an * *innuendo* cannot beget an action, nor make that certain which was uncertain before, and that here was no scandal; and if so, this was not a *libel*. *Sed per Holt*, Ch. Just. Scandalous matter is not necessary to make a libel, it is enough if the defendant induces an ill opinion to be had of the plaintiff, or to make him contemptible and ridiculous; as for instance, an action was brought by the husband for riding *Skimmington*, and adjudged that it lay, because it made him ridiculous, and exposed him. Every man understands who is meant by the *young gentleman* on the other side of the water; if words are false, the defendant may justify in an action, but not in an *indictment*.

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* 3 Cro. 428. 2 Rep. 10. Roll. 82. Yelv. 21. Hob. 6. 1 Roll. Rep. 24. 2 Wilson 403.

5. THE KING *v.* BEAR.

[Hill. 10 Will. 3. B. R. 1 Ld. Raym. 414. S. C.]

INDICTMENT for *making*, *writing*, *composing*, and collecting several *libels*, *in uno quorum continetur inter alia*, *juxta tenorum et ad effectum sequen'*, *&c.*; after a verdict this was held good, *for juxta tenorem* imports the same words; for * *tenor* is a transcript, which it cannot be if it differs from the libel; if it had been *ad effectum sequen'*, it would not do, for that might import an *identity* in sense, but not in words.

2 Salk. 417.

* Ante, 2. S. P.

LIMITATION OF ACTION. See Evidence, 5.

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1. COLLINS *v.* DENNING.

[Hill. 12 Will. 3. B. R.]

ASSUMPSIT, in which the plaintiff declared, that the defendant being indebted to him (the plaintiff) in 20*l.* promised to pay it *upon demand*, and that he (the plaintiff) had on such a day and place demanded it, but the defendant refused to pay it; the defendant pleaded *non assumpsit infra sex annos*, *&c.* and upon a demurrer to this plea it was insisted that it was ill, for it should not be *non assumpsit*, but *actio non accrevit infra sex annos*, *&c.*; because the duty arises from the *demand*, and not from the *promise*: But this objection was not allowed, for payment upon demand is no more than what is implied by law (*a*).

Where non assumpsit infra sex annos, is a good plea. 12 Mod. 444. S. C.

(*a*) If the promise had been of a collateral thing, which would create no debt till demand, it might be otherwise. *Bull. N. P.* 151.

2. EWERS *v.* JONES.

[Mich. 2 Annæ, 2 Ld. Raym. 934. S. C. Comyns 137. S. C.]

LIBEL in the Admiralty by the seamen against the owners for wages; the defendants pleaded the statute of limitations, (*viz.*) *That it appeared by the libel*, that no suit was prosecuted for this matter within six years, whereas they should have pleaded directly, that no suit had been brought within six years after the cause of action accrued; and if

6 Mod. 25. S. C. Statute not well pleaded.

the statute had been rightly pleaded, it would have been a good bar; for *per Holt*, Ch. Just. though the statute doth not extend to *causes maritime*, spiritual, or *equitable*, but only to *duties at common law*, yet mariners' wages are a duty at *common law*, and, if sued for at common law, the statute would have been a good bar.

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3. HYDE v. PARTRIDGE.

[Pasch. 1 Annæ, 2 Ld. Raym. 1204. S. C.]

Salk. 424. S. C. Whether the statute extends to mariners' wages.

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UPON a motion for a prohibition to the Admiralty, suggesting a contract at land, and a suit for wages thereon by the mariners against the owners, upon an outward * bound voyage, and that he had pleaded the statute of limitations in that court (*a*); which plea was rejected, so that the statute did not extend to *causes maritime*, &c., and that it was no plea in bar to a *trust* or to a *legacy;* and now it was insisted for the prohibition, that the common law had a proper jurisdiction for mariners' wages, and that the suit might be as well brought for such wages in the courts of common law as in the Admiralty; so that the Admiralty had at most but a concurrent jurisdiction in this case with the courts of common law, and that only by indulgence of law, which ought not to be extended so far as to suffer them to proceed in the Admiralty otherwise than they might at common law: *Et per Holt*, Ch. Just. It is a question among merchants, Whether mariners' wages were due for outward-bound ships? But *per Powel*, Just. Whether they are due or not, is a question properly determinable in the Admiralty; and he questioned whether the statute could be pleaded to a suit in the *spiritual court for laying violent hands on a clerk;* and *per Holt*, Ch. Just. clearly it would be no plea in that case, no more than it would be to an indictment at common law, for that is a prosecution of a public nature, *pro reformatione morum*, and not a private action of the party to have recompence in damages, the rule was for the plaintiff to take a prohibition, and to declare upon it.

(*a*) He pleaded, that the contract was made ten years before; which was held an immaterial plea. *Vide* the Report in Ld. *Raymond*. As to the principal point, it is provided by *stat.* 4 *Anne, ch.* 16., that the statute of limitations shall extend to these suits.

4. MORSE *v.* BRAXTON.

[Pasch. 12 Will. 3. B. R.]

CASE, *&c.* in which the plaintiff laid his action in *Norfolk;* the defendant pleaded the statute of limitations; the plaintiff replied an original taken out in *Suffolk*, upon which they were at issue, and the plaintiff had judgment in *C. B.;* but, upon a writ of error in *B. R.*, that judgment was reversed, because an original in one county cannot maintain an action in another county.

An original in one county cannot maintain an action in another county. Vide 2 Salk. 420. 3 T. R. 662.

5. *Scandalum magnatum* is not within the *statute* 21 *Jac. cap.* 16., nor slanderous words, which are actionable only by reason of any subsequent loss or damage, nor *slandering a title;* but slanderous words, which are personal and actionable in themselves, are within the statute.

Words which are actionable are not within the statute. Lit. Rep. 342. 1 Sid. 95. Cro. Car. 141.

6. Where the *plaintiff is beyond sea*, his case is not within the statute; but, if the *defendant is beyond sea*, it is otherwise (*a*).

Where the plaintiff is beyond sea his case is not within the statute.

7. Where an action is barrable by this statute, a new promise will revive it; so it is of an acknowledgment, because that is evidence of a promise.

Where a new promise will revive the action. Vide 1 Salk. 29.

*8. A *latitat* taken out and continued is a good avoidance of the statute, for it is a demand.

1 Str. 550. Bull. N. P. 151. 2 Bl. Rep. 1131.

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(*a*) The law, in this respect, is altered; *stat.* 4 *&* 5 *Ann. ch.* 16.

MANDAMUS.

1. WILKINS *v.* MITCHELL.

[Trin. 10 Will. 3. 1 Ld. Raym. 348. S. C. And see the Note in Ld. Raym. 348. *contra.*

IN an action of debt for rent brought in an inferior court, the plaintiff was nonsuit, whereupon the defendant had judgment; but they refusing to execute it, *B. R.* was moved for a *mandamus*, but it was denied, because the defendant had a legal remedy, (*viz.*) by the writ *de executione judicii* out of the Chancery.

Mandamus denied, where the party hath another, and proper remedy. Vide ac. Doug. 506. Mod. Cas. 98. 1 Term Rep. 396. 3 T. R. 646.

2. THE KING v. MAYOR OF DARTMOUTH.

[Trin. 12 Will. 3.]

Mandamus to restore a serjeant ad clavem, instead of clavam.

A *MANDAMUS* to restore *W. N.* to the place *servientis ad clavem*, meaning the serjeant of the mace, *&c.* The return was, that there was no such office in that corporation, but that there was an office *servientis ad clavam*, to which they prescribe to put in and out an officer at pleasure, *&c.*

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3. THE KING v. MAYOR OF ANDOVER.

[Trin. 12 Will. 3.]

2 Salk. 433. It will not lie to restore a poor alderman. Rex v. Liverpool, 2 Bur. 723., semble contra.

MANDAMUS to restore him to the place of an alderman in *Andover;* the return was, that he was so poor that he could not pay the taxes: *Et per Holt*, Ch. Jus. Where a man through poverty cannot pay his *scot and lot*, it is fit to deprive him of his magistracy, but not of liberty; so a *mandamus* was denied.

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4. LEE v. OXENDEN.

[Trin. 3 Will. 3. B. R.]

3 Lev. 309. Show. 217, 251, 261. Skin. 290. 3 Mod. 332. Not granted to restore a proctor in Doctors Commons. Carth. 169.

LEE suggesting that he was *debite juratus & admissus in loco & officio* of a *proctor*, *&c.*, and also that he was displaced and amoved from his said office, prayed a *mandamus* to be restored, and insisted, that he had a freehold in his office, and that it concerned the administration of justice; but the *mandamus* was denied, because this matter was merely spiritual, and *B. R.* cannot take notice of it, nor correct errors in their proceedings, in cases where they have a proper jurisdiction and cognizance; so that this being of an ecclesiastical nature, and the deprivation being a judicial act, it cannot be avoided but by appeal.

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5. THE KING v. MAYOR OF CHESTER.

5 Mod. Mandamus to restore nine persons jointly, quashed for that reason. 2 Salk. 433. S.P.

A *MANDAMUS* was granted to restore *Brett* and eight other persons to the place of *common council-men of Chester;* the mayor made a bad return, however, the Court quashed the *mandamus*, being *joint for nine persons*, when they had *several offices and interests*, and ought to have several writs of *mandamus*.

6. THE QUEEN *v.* CORY.

[Mich. 8 Will. 3.]

Where not granted without an affidavit of the fact.

THE Court was moved for a *mandamus* to the *justices of peace*, for that they proceeded to remove *W. R.* from his place of abode, after he had offered to give security to indemnify the parish: *Et per Holt*, Ch. Just. In a *matter of right*, as for instance, where a *mandamus* is prayed to *restore a man, &c.*, we never require an *affidavit of the fact;* but this is required upon a supposed *failure of duty* in the justices, and therefore denied to grant a *mandamus* till *affidavit* made, *&c.*

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7. KING AND QUEEN *v.* DR. GOWER.

[Trin. 1694. B. R.]

Mandamus will not lie to turn out a fellow of a college. Vide Skin. 393, 546.

A SPECIAL mandamus was directed to Dr. *Gower, &c.* reciting, that such particular fellows of his college had not taken the oaths, so that their fellowships were void by the statute 1 *Will.* 3., and requiring him to turn them out, and to place new fellows in their room; the return was of several statutes, one of which was, that no one shall lose his freehold without being heard and admitted to answer the charge, and that the persons named in this *mandamus* were duly elected, *&c.*, and that *non constat, &c.;* but they had taken the oaths: *Et per Curiam*, As to this last part of the return, it is ill, because the oaths are to be taken before the *master and fellows;* but the chief question was, Whether a *mandamus* would lie in this case, and in this manner? and the Court inclined, that it would not, because the fellows who are to be turned out, are no parties to this writ, so that they would be displaced without being heard, and without answer; and this differs from the common cases of *mandamus*, which are usually to restore men to their rights, and are directed to them by whom the injury is done; and though it may happen, that even in such a case a man may be turned out of his place, yet that is collateral, and not by command of the writ.

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8. THE KING *v.* TAYLOR.

Mandamus to whom to be directed, and where the return was ill, and where the cause of removal was just.

MANDAMUS to restore him to his place of *alderman of the city of Gloucester;* the return was made by the mayor and bailiffs, (*viz.* they returned their power, *&c.*, and that *Taylor* was removed by thirty of the common council-men in *the council-chamber assembled*, for that he was a *common*

Vide 2 Bur. 723, 738. 2 Str. 1051.

drunkard: Et per Curiam, this return was adjudged ill, because it did not appear, that the *thirty common council-men* were then and there assembled as a *common council*, for they might be there to feast, or to other purposes.

But that the cause returned was sufficient to remove him; it is true, if a man is drunk by accident, that would not be cause to remove him; but habitual drunkenness makes a man unworthy to be a magistrate, and disables him in point of government.

Though the removal was by the mayor and thirty of the common council-men, yet the writ ought not to be directed to them, but to the corporation by its proper name, as it was in this case to the *mayor and bailiffs*.

1 Roll. Rep. 409. 3 Bulst. 189.

But the return being ill for the reason before mentioned, a writ of restitution was granted: And afterwards the question was, Whether the corporation might proceed against him *de novo* for his drunkenness? and the Court held they might.

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9. THE KING *v.* WHITE.

[Trin. 2 Annæ.]

Denied to restore a clerk of a company in London. Vide Bur. 999. 1 Str. 696. 1 Sid. 40. Mod. Ca. 18.

MANDAMUS to restore him to his place of *clerk to the Butchers' Company in London*, it being a charter-office; but, *per Curiam*, it was denied, for if it is an office of freehold, he may have an assize; if it is not an office of freehold, then it is only a private service, which doth not concern the public.

10. THE QUEEN *v.* INHABITANTS OF LITTLEPORT.

[Hill. 2 Annæ.]

2 Salk. 531. Mod. Cases 97. Mandamus to the present overseers to make a rate to reimburse the old ones. Vide Str. 63.

THIS case is reported in 2 *Salk.*, by the name of *Tawney's case*; it was thus: *ss.* A *mandamus* to the churchwardens and overseers of the poor of the parish of *Littleport*, to make a rate to reimburse the old overseer of the poor what money he had laid out, of his own, for relief of the poor: The return was, that the major part of the parishioners did not agree to his accompt; and the question was, Whether the plaintiff *Tawney*, being a former overseer, but now out of his office, should have a *mandamus* to the present overseers to make a rate to reimburse the money he laid out, of his own, to relieve the poor? It was insisted on his behalf, that he should have a *mandamus*, because he was indictable for not relieving the

poor, though he had none of the parish money in his hands, and he might die in his office, therefore it seems reasonable, that the law should give him some remedy, since it subjects him to this charge. But *per Curiam*, the law doth not oblige him to lay out his own money to relieve the poor; but he is to make a *rate*, and this is to be allowed by the justices, and the poor are to be relieved out of this money when raised, otherwise the consequence would be, that overseers of the poor would lay out what money they pleased, and charge the parish with it; so that what he did in this case was voluntary, being in no wise compellable to do it, and therefore it would be unreasonable in this Court to compel the succeeding overseers to reimburse him; he should either have kept his own money, or taken care to have a *rate* made, and that would have been his proper method; and this Court never allows a *mandamus* where the law hath provided another remedy, and a *rate* cannot be made as for him, but to relieve the poor.

11. THE QUEEN *v.* SIR RICHARD RAINES. [233]

[Mich. 6 Annæ.]

1 Salk. 229. Mich. 10 W. Mandamus to admit one to the probate of a will.

THERE is a case reported by this name in 1 *Salk.*, but it is not the same case, nor in the same term, but four years after. *ss. Mandamus* to admit her to the *probate of a will* by which she was executrix; the return was that she was made *executrix durante minore ætate of W. R.*, and that the said *W. R.* was now of full age, so that the testator remained intestate. *Et per Holt*, Ch. Just. he should have returned generally, that she was not executrix, or if he would return the special matter, as he hath done, he should have averred, that she was not executrix *aliter vel alio modo;* but that the return now made was not a direct answer to the writ, but only argumentative, to shew that she was not executrix. But the Court would not grant a *peremptory mandamus;* they quashed this for the insufficiency of the return, and amerced the defendant, and ordered an *alias mandamus*, that the suggestion of the writ might be fully and plainly answered.

Cumb. 185. Carth. 457. ant. 162.

12. Though the return is insufficient, yet if it appear thereby that the party ought not to be restored, he shall not be restored.

Sid. 14.

13. Where the place is of mere service, no *mandamus* will lie; as for an *usher of a school;* but where it is an office as *churchwarden*, *sexton*, *steward* of a court, &c. a *mandamus* will lie; and so it will to restore an *attorney* to his place of attorney in an inferior court, and to restore the treasurer of the New-River-water; but it will not lie to restore the *proctor* of a spiritual court.

Sty. 457. Sid. 71, 94, 152, 169. 3 Mod. 332. 4 Mod. 234. Cumb. 210. 1 Lev. 123. ante 230. 6 Mod. 18. Skin. 290.

1 Lev. 14, 23, 75. 1 Wilson 206.

14. A *fellow of New College* was expelled by the *warden*, &c. whose sentence was confirmed by the *visitor;* and this being returned on a *mandamus*, it was objected, that the cause of his expulsion did not appear. *Sed per Curiam*, This being a private eleemosynary society, and a visitor appointed by the founder, *no mandamus lies;* and therefore it is to no purpose to object against the return. *Bagg's case* was the first *mandamus* of this sort; as for those mentioned in *Ryley* they are no more than letters recommendatory.

Andr. 176. Sho. 74. 2 Lev. 15. Carth. 168.

2 Lev. 18. Ray. 211. 1 Ventr. 143, 155.

15. *Mandamus* lies to restore a *sexton* upon a certificate, that he is an officer for life, and had so much of every house in the parish for wages.

1 Vent. 302. 11 Co. 96. 2 Salk. 426. [* 234]

* 16. *Mandamus* to restore a common council-man; the return was, that the said *Alderman W. R. was a knave;* disallowed, for the words have no reference to the *corporation:* It was held by my *Lord Hale*, that returns of this nature ought to be sworn, and that it was so done in *Meddicott's* case; but of late it was disused.

MASTER AND SERVANT.

1. SIR ROBERT WAYLAND'S *CASE*.

Where the master is liable for the cheat of his servant. Vide infra.

HE used to give his servant money every *Saturday* to defray the charges of the foregoing week, the servant kept the money; yet, *per Holt*, Chief Justice, the master is chargeable, for the master at his peril ought to take care what servant he employs; and it is more reasonable, that he should suffer for the cheats of his servant than strangers and tradesmen; so if a smith's man pricks my horse, the master is liable.

1 Roll. 94, 95.

2. BOULTON *v.* ARLSDEN.

[Pasch. 9 Will. 3. B. R. at the Sittings at Guildhall, *coram* Holt, Chief Justice.]

1 Ld. Raymond 224. Where the master is not liable for his servant. See 1 Wilson 328.

IN this case it was held, that where a *servant* usually buys for his master upon *tick*, and takes up things in his master's name, but for his own use, that the *master* is liable, but it is not so where the master usually gave him ready money (*a*).

(*a*) *Vide ac.* 1 *Str.* 506.

That where the master gives the servant money to buy goods for him, and he converts the money to his own use, and buys the goods upon *tick*, yet the master is liable, so as the goods come to his use, otherwise not (*a*).

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That a note under the hand of an apprentice shall bind his master, where he is allowed to deliver out notes, though the money is never applied to the master's use.

Ca. Law and Eq. 110. 3 Bac. Ab. 558.

But where he is not allowed or accustomed to deliver out notes, there his note shall not bind the master, unless the money is applied to the master's use.

Skin. 149. Ch. Rep. 25, 76 Where a factor of the East-India Company shall have the benefit of what he saved, and which the Company ought to have paid.

A factor of the *East-India* Company carried over 1200*l*. in gold to *India*, where a *custom* was due for it, but saved by the factor, and never paid: *Et per Curiam*, the factor shall have the benefit of it, and not the *East-India* Company, for it was due from them and ought to have been paid; therefore they cannot make a title to it against one who hath the possession, for that is sufficient against all persons but against him who hath the very right, and the non-payment in this case was at the peril of the factor.

(*a*) If the master never had any previous dealing with a tradesman, but the tradesman's dealings have all been with the servant, whom the master has regularly paid; in that case the master shall not be charged. As where the action was for oats and hay furnished for the defendant's horses; the plaintiff having had no dealings with the master, but with the coachman, to whom the master gave money for the purpose monthly; the plaintiff never applied to the defendant (the master) during the time, and the demand was for years standing; it was ruled, that the master was not liable. *Per* Lord *Kenyon* at *Nisi Prius. Espinasse*, 115.

MISCASTING. See Money.

MISNOSMER.

1. LEPARA *v.* SIR JOHN JERMAINE.

[Pasch. 1 Annæ.]

1 Salk. 50. S. C. Baronet is a dignity and part of his name. 2 Ld. Raym. 1178.

THE defendant was sued by the name of *John Jermaine, Knight;* he pleaded in *abatement*, that he was a *knight and baronet;* the plaintiff replied, that he (the defendant) was a *knight* only; but the plaintiff perceiving

his mistake, and the proceedings being all in paper, he prayed * leave to amend, but it was denied, because there was nothing to amend by, for the bill and process was by the name of *knight;* then the question was, Whether *Baronet* was such a necessary part of his name as the action must abate for want of it? *Et per Holt*, Ch. Just. *baronet* is as an essential part of his name as knight, because it is a *dignity*, and whether it is created by act of parliament or by letters patents, it is part of his name, as *duke*, *viscount*, *marquis*, *baron*, though as to this last name of dignity, there is a difference between a *baron by tenure* and a *baron by patent*, for in the first case, *baron* is not a name of dignity; and if it is omitted it shall not abate the action, but a *baron by letters patent is a dignity*, and part of his name.

2. THE KING *v.* BISHOP OF CHESTER.

Where the declaration is aided by the verdict.

IN a *quare impedit*, the plaintiff claimed under a grant to Sir *William Sands*, who granted to the Lord *Derby;* the defendant pleaded, that Sir *William Sands*, *non concessit* to the Lord *Derby;* upon which they were at issue, and the jury found, that it was granted to the said *William Sands* in the declaration, by the name of *William Sands*, Esq., being then an *esquire*, and afterwards made a *knight; Et per Curiam*, This declaration is aided by the verdict, by which the grant and the identity of the person were found; and this explanation is no more than what is often done by the plaintiff himself in late cases, as for instance, where *W. R.* is bound in a bond by the name of *W. R.*, *Esq.*, and is afterwards *knighted*, the plaintiff must bring his writ against him by the name of *W. R.*, *Knight*, but in his declaration he must shew the special matter, (*viz.*) that the defendant bound himself by the name of *W. R.*, *Esq.*, and was afterwards *knighted;* but it is otherwise if the defendant had craved *oyer* of the bond and demurred.

Vide 1 Ld. Raym. 303. Skin. 651. Sho. P. C. 212.

3. THE KING *v.* BISHOP OF CHESTER AND PEIRCE.

1 Ld. Raym. 292. 2 Salk. 560. S. C. Knight is a dignity and part of his name.

IN a *quare impedit*, the defendant, as patron, pleaded a grant made by King *Charles* I. to *William Thackston*, *Armigero*, *postea militi*, who granted it to the defendant; the plaintiff craved *oyer* of the letters patents, *&c.*, and it appeared to be a grant to Sir *William Thackston*, *Knight*, and upon a demurrer to the plea, *Rokeby*, Just. was of opinion, that this might be the same person, for he might

have such a name by reputation: But *per Holt*, Ch. Just. a grant to *William Thackston, Esq.* by the name of *William Thackston, Knight*, cannot be good, because *knight* is a name of *dignity*, and part of *his name, and as much his name as the name of *baptism*; and if he might have such a reputative name, he ought to have pleaded it so, (*viz.*) *per nomen*, or *cognitus & reputatis per nomen, &c.*, as in the case of a *bastard*; but *knight* cannot be a name in *reputation*: there is no foundation for it, as in the case of a *bastard*, or the eldest son of a *duke*, who by the laws of heraldry takes place as a *marquis*, but the title of *knight* can be only conferred by the king; and in ancient conveyances the eldest sons of *dukes* and *earls* had only the addition of *esquire*, commonly called *marquis, &c.* and now the course is to make the addition of *eldest son* to such titles.

4. COLLEGE OF PHYSICIANS *v.* DR. SALMON.

[1 Ld. Raym. 680. S. C.]

5 Mod. 327. 2 Salk. 451. S.C. Misnosmer in the name of the corporation.

DEBT against the defendant, for *practising physic without license*, in which the plaintiffs declare by the name of the president of the college, *seu communitas* of the faculty of physic in *London, &c.* The defendant craved *oyer* of the letters patents, whereby it appeared they were incorporated by the name of the *president, college, sive communitas* of the faculty of physic in *London*, and were empowered to sue and be sued by the name of *presidens collegii, sive communitatis facultatis medicinæ in London*, and then pleaded *misnosmer* in abatement: *Et per Curiam*, the plea was adjudged good, for they may sue by their name of incorporation, which is president, *collegium, sive communitas* of the faculty of physic, *&c.*, or by the name given to them for that purpose, which is *presidens collegii, sive communitatis, &c.*, but here they sue by neither of those names, but by the name of *president of the college, seu communitas, &c*; so judgment was given *quod billa cassetur*.

Afterwards, *Trin.* 13 *Will.* 3. *B. R.*, another action was brought by the same plaintiff against the same defendant, and for the same cause; and this was brought in the name of *president, college, or commonalty*, which was the true name of the incorporation; and upon demurrer it was objected, that it ought to be brought in the name of *president of the college*, for by that name they have power to sue: *Sed per Curiam*, they may sue by the name of *incorporation*, or by the name of *president* only; but though by their charter they have power to sue by that name; yet *per Holt*, Ch. Just. it is better (as in this case) by the name of their incorporation.

5. ANONYMOUS.

[Hill. 2 Annæ.]

Traverse of his name, where it is repugnant.

Vide Rep. B. R. Temp. Hard. 286. 1 Salk. 6.

THE plaintiff declared against the defendant by the name of *John;* the defendant pleads he was baptized by the name of *Benjamin*, and traversed, that *ipse idem Johannes* was ever known by the name of *John;* and upon a general demurrer to this plea, *per Holt*, Ch. Just. this traverse is repugnant in itself, and stands but as matter of form, yet pleas in *abatement* are not within the statute of *Eliz.*, but only pleas to the *right* and to the merits of the cause; but though the *traverse* was repugnant, it is not immaterial, because it waived the precedent matter, which was pleaded before of baptism, and was become the substance of the plea itself, so that now the issue must be by what name the defendant was called and known, and not by what name he was baptized; but he might have relied upon his name of baptism, and concluded with it, for a man can have but one name of baptism, therefore it implies a negative of itself, without saying, that he was called or known by no other name (*a*).

(*a*) But at last a *respondeas ouster* was awarded. 1 *Salk.* 6, 15.

6. ANONYMOUS.

[Mich. 10 Will. 3.]

Where an alias dictus is proper. 1 Lutw. 10, 895, 519. 6 Mod. 217. Cumb. 188. 2 Sho. 394. 6 Mod. 225. 1 Salk. 7, 17.

THE obligor was bound by the name of *W. R.;* he may be sued by the name of *W. R.*, *alias dictus W. C.* if his name is so; but if his name is *R. W.*, the obligee cannot sue him by the name of *S. W.*, *alias dictus R. W.*, for he cannot have two names of baptism, neither is there any remedy unless he hath estopped himself by appearance.

7. KNIGHT'S *CASE.*

[Trin. 2 Annæ, 2 Ld. Raym. 1014. S. C.]

1 Salk. 329. Where John was sued, and he pleaded in abatement, that his name was Thomas. 6 Mod. 310.

ACTION against *John Knight;* the defendant pleaded in *abatement*, that his name is *Thomas*, and thereupon the plaintiff commenced a new action against him by his right name *Thomas;* the defendant pleaded in *abatement* a former action depending; and upon a demurrer to this plea it was insisted, that the averment was against the record, for that *John* and *Thomas* could not be the same

person: *Sed non allocatur*, for in fact it may be so, the plaintiff should have confessed the *misnosmer*, and prayed an abatement of his writ before he had proceeded to a new one.

8. ALLEN *v.* SYMONDS.

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CASE, *&c.* in which the plaintiff declared against the defendant by the name of *Symonds;* the defendant pleaded in abatement, that he was known by the name of *Synms*, *absque hoc*, that he was known by the name of *Symonds;* the plaintiff replied, that he (the defendant) was known as well by the one name as by the other; and upon a demurrer to this replication, *per Holt*, Ch. Just. the * precedents are both ways; thereupon the defendant accepted a new declaration, but without payment of costs.

4 Mod. 347.

* Rast. Ent. 716. Old. Ent. 27.

MONEY.

1. DIXON *v.* WILLOWS.

[Mich. 8 Will. 3.]

UPON a motion in arrest of judgment, after a verdict upon an *indebitatus assumpsit* for 13 *l.* 16 *s.* for *nine guineas*, without saying *ad valorem;* It was held, that the *broad-pieces* were in effect the *first guineas* coined in *England* for 20 *s.*, and went at that rate for some time; but the value of gold rising, these broad pieces were made current by proclamation at 1 *l.* 1 *s.* 4 *d.;* and though there was afterwards a second rise in the price and value of gold, yet there was no proclamation to raise the value of these pieces in proportion to the value of gold. But afterwards, when *guineas* were coined, they were made in respect to the value set upon *broad-pieces* by proclamation, as aforesaid; though there is no act of parliament or order of state for these *guineas* as they now are taken, yet being coined at the mint, and having the king's *insignia* on them, they are lawful money, and current at the value they were coined and uttered at the mint.

2 Salk. 446. S. C.

Cumb. 387. Skin. 572. Carth. 322. 1 Lut. 488.

Jones 69. 4 Mod. 410. 5 Mod. 7.

2. *Assumpsit* for several particulars, amounting in all to 70 *l.*, but by *miscasting* it was alleged to amount to 90 *l.;*

1 Lev. 58

per Curiam, should the jury give above 70 *l.* the verdict would be naught, if under 70 *l.* it is good.

2 Lev. 4. Vide 2 Vent. 129.

3. Debt for rent, and the plaintiff demanded less than due, adjudged ill after a verdict; the case was, that the year's rent amounted to 60 *l.*, and the plaintiff declaring for the arrears of one year and a half, demanded 80 *l.*; whereas it came to 90 *l.* *See Cro. Eliz.* 22 *contra*.

2 Lev. 57.

4. In covenant, and a general demurrer to the declaration, for that the plaintiff demanded more than appeared to be due upon the first breach, and less upon the second. *Et per Curiam*, The first may be cured by the plaintiff's *release*, or by the verdict upon the writ of inquiry finding less; and as to the second, it is well after verdict, or upon a general demurrer, but not upon special demurrer, and shewing it for cause.

MORTGAGE.

1. GOREY'S *CASE*.

[Hill. 9 Will. 3. in Cancellaria.]

Vide ante. p. 24.

DECREED by the Lord *Chancellor Somers*, That where a mortgagee lends more money upon bond to the mortgagor, he shall not redeem unless he pay the principal and interest due on the bond, as well as on the mortgage. But if he mortgage the equity of redemption to another, the second mortgagee shall not be affected with this bond, because it is but a personal charge upon the mortgagor. *Et per Holt*, Ch. Just. If a purchaser pay the money to the mortgagee, he (the mortgagee) is become a trustee for the purchaser.

1 Vern. 268, 395. 1 Ch. Rep. 1. Where a mortgagee cannot have a remedy to recover his money, the mortgagor cannot compel a redemption.

2. One having the reversion in fee expectant upon the determination of a lease for life, in an estate worth 1000 *l. per annum*, conveys it in fee to *W. R.* in consideration of 1000 *l.* and no more; the tenant for life dies, and now the conveyance to *W. R.* is pretended to be no more than a mortgage, because he had declared, *That he did not know how long he should enjoy the estate, and that he would take his money again, with interest: Sed dubitatur per Curiam*, because *W. R.* had no remedy to recover his money; and where a mortgagee cannot compel the repayment of his money, the mortgagor shall not enforce a

redemption, for the remedy ought to be reciprocal; and besides, matter subsequent will not make it a mortgage, if it was not so upon the original agreement.

3. Where a mortgagee assigns the mortgage, all money really paid by the assignee, if due at that time, shall be accounted principal as to the mortgagor, whenever he comes to redeem.

1 Vern. 169. 1 Ch. Rep. 68, 258. Where a mortgagee assigns, all the money then due shall be principal. Treatise of Equity 120. Bunb. 41.

4. When the heir of the mortgagee is to reconvey the estate mortgaged, and there is no defect of *assets* in the hands of the executor, the redemption-money shall be paid to the heir, if the condition was to pay it to him; so if it was to pay it to the mortgagee, his *heirs, or assigns;* so it is if it was to be paid to his heirs *or* executors; but it is otherwise, if it was to be paid to the executors only.

1 Ch. Rep. 83. Redemption-money to be paid to the heir, if no defect of assets in the executor. Postea 7. Vide 2 Salk. 449.

5. Mortgagee, where the mortgage is forfeited, shall have interest for his interest; (*a*) and so shall an assignee, for all interest due from the time of the assignment.

1 Ch. Rep. 258 Where a mortgagee shall have interest for his interest.

6. Mortgage to *W. R.* and his heirs; but that they should reconvey, if the mortgagor, his heirs, executors, or administrators should repay the principal sum and interest to the said *W. R.*, his heirs, executors, administrators, or assigns; the mortgagee died, and the mortgage being forfeited, the question was, Whether the heir of the mortgagee, or his executors, should have the redemption-money? For the heir was to reconvey, and there was no defect of assets in the executors' hands; and by the condition it was limited to the *heir* as well as to the executor. Adjudged, that *equitas sequitur legem* as near as may be; now if the condition had been to repay, without mentioning to whom, in such case the executor should have the money; because it first came out of the personal estate; but the benefit of redemption being forfeited in law, it is all one in a court of equity, as if neither heir or executor had been named; and therefore in that case equity will appoint the executor to have it, because the right of the mortgagee was only to the money, for which the land was no more than a security, and as his right to the land was in that respect only, therefore the money is personal estate, and must come to the executor; but where the condition appoints the money to be paid either to the heirs *or* executors in the disjunctive, and the mortgagee comes at the day, he hath his election by law to pay it to either; (*b*) and all mortgages belong to the personal estate, though made in fee.

1 Ch. Rep. 181, 283. Where the redemption-money shall be paid to the heir, and where to the executor. Antea 5. S. P. 2 Vern. 193.

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(*a*) This certainly is not true; even an express agreement for the purpose will be void. *Vide 2 Salk.* 449.

(*b*) But in this case the heir would be deemed a trustee for the executor. *Vide Powell* on *Mortgages.*

NOBILITY

1. THE KING v. KNOLLIS.

[Trin. 6 Will. 3. B. R. 1 Ld. Raym. 10. S. C.]

2 Salk. 509. Where nobility was pleaded in abatement to the writ.

THIS case is reported in 2 *Salk.*, but it was as followeth: The defendant was indicted by the name of *Charles Knollis, Esquire, at Hicks's Hall*, for murder, which indictment being removed into *B. R.* by *certiorari*, he pleaded in *abatement*, that *William Knolls, Viscount Wallingford*, was, by letters patent under the Great Seal of *England*, which he produced in court, created *Earl of Banbury*, to him and the heirs males of his body; that he died, and that the honour descended to *Nicholas Knolls*, his son and heir, who died, and the honour descended on the defendant, son and heir of the said *Nicholas*. *Et hoc paratus est verificare.* The attorney-general replied, that the defendant, on such a day, *petitioned* the lords in parliament to be tried by his peers; and that they, upon consideration thereof, *dismissed his petition*, and disallowed his peerage; and, upon a demurrer to this replication, these exceptions were taken to the plea.

(1.) Because it doth not conclude *prout patet per recordum.*

(2.) That there ought to have been a writ to certify the descents.

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(3.) That the plea ought to have averred *Banbury* to be in *England.*

(4.) That the defendant did not plead, that he was *unus parium regni Angliæ.*

(5.) That this plea is avoided by the replication, that the defendant was barred of his peerage by the order of the House of Lords.

Which objections were thus answered:

(1.) And first the Court held, that here being descents pleaded, which are *matters of fact*, for that reason *prout patet per recordum* would have been a very improper issue; and that *earl or no earl* could not have been an issue in this case, but *non concessit* only; because the letters patents are set forth upon record, and therefore they held nobility in this case triable *per pais;* so where nobility is gained by matter of fact, it is triable as aforesaid; as for instance, where it is gained by *marriage*; but where it is by *writ*

only, or by *patent*, without descents, it is not triable but by record, and in such case the plea must conclude *prout patet per recordum*, and so are the * old books to be intended.

* 22 Assize 24. Br. Assize 240.

(2.) As to the second objection, a *writ to certify the descents* is only *cautionary*, and not necessary.

(3.) They held, that the defendant need not aver *Banbury* to be in *England*, for it will be intended that it was; besides an *earldom* consists in *dignity and office*, and it is not material whether the place be in *England*, or not; as for instance, there is no such place as *Rivers*, or *Albemarle*, in *England*, and yet there are such *earls;* for the great seal, which necessarily relates to *England*, makes them *English peers;* it is true, the king may create an *Irish* peer under the great seal; but that must be by express words in the patent.

(4.) The defendant needs not aver, that he is *unus parium regni Angliæ*, because he appears to be so by letters patents now produced; and as to that matter, *Eyre*, Justice, took this difference, (*viz.*) where peerage is claimed † *ratione baroniæ*, as by a *bishop*, he must plead, that he is *unus parium regni Angliæ;* but where the claim is *ratione nobilitatus*, he needs not plead otherwise than pursuant to his creation.

† 4 Inst. 15.

(5.) It was adjudged, that the order of the House of Lords did not take away the defendant's peerage, nor conclude him, because his cause was not properly before them; ‡ the course is, where a man is disturbed in his title, to petition the king, who indorses the petition, and sends it into Chancery.

‡ Stamf. Prær. 72. 22 Ed. 3. 5. L. quinto Ed. 4, 117.

The dignity of peerage may be forfeited by attainder, but it cannot be surrendered or transferred by fine.

*A personal honour, as the dignity of peerage, may be forfeited by attainder, for it is implied by a condition in law, that the person dignified shall be loyal; and this dignity after attainder cannot descend, because the blood by which it is to descend is corrupted; such a dignity cannot be *surrendered*, or *transferred by fine*; for it is a quality affixed to the blood, and so merely personal, that a fine cannot touch it; besides, if it was permitted, it would draw the trial of peer or no peer into the court of Common Pleas, which is determinable only in parliament, (*viz.*) in the House of Peers.

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NOLLE PROSEQUI, OR NON-SUIT.

" The Serjeant's Observations upon this Title, and upon a " *Retraxit.*"

Co. Lit. 138, 139. 1 Wilson 90. Difference between a nonsuit and retraxit.

1. A *NONSUIT* is, where the plaintiff ought to appear, but makes default; but a *retraxit* is, where the party is in court and makes default.

Nonsuit is never peremptory before appearance.

2. A nonsuit is either before appearance, at the return of the writ, or after, at some day of *continuance*, for the plaintiff is always the first agent, but it is never peremptory before appearance; it is true, after appearance, and in some cases, it is peremptory, as in *appeals quare impedit*, and *attaints*, &c.

Where the nonsuit of one is the nonsuit of all.

3. In *personal actions*, the *nonsuit* of one is the *nonsuit* of all the plaintiffs except in some cases, where *summons and severance* is allowed; it is so in trespass, and it is so in debt; as for instance, if an action of debt is brought against *A.*, *B.*, and *C.* by several *præcipes*, a nonsuit *quoad A.* is a nonsuit *quoad* the other two, but it is otherwise in a *discontinuance*.

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See Sid. Blake's case.

4. So where action of debt was brought against three coheirs, two of them confessed assets, and being at issue with the third, the plaintiff was nonsuit; this shall enure to all.

* 1 Inst. 139. b.

† Dyer 53.

5. At common law, upon every *continuance* or day given, the plaintiff might be nonsuit, so that even after a * verdict, if the Court took time to consider and be advised, the plaintiff was demandable, and might be nonsuit; but this is now remedied by the statute 2 *H.* 4., yet after a † *privy verdict* the plaintiff may still be *nonsuit*, and so he may after a *special verdict* found, because the matter was argued, and so he may after a demurrer, though the matter was argued, if the Court give a day over, for the plaintiff is then demandable.

6. As to a *retraxit* the rule is, *qui semel actionem renunciavit amplius repetere non potest*; therefore a *retraxit* is a bar to any action of equal nature brought for the same cause or duty, but a nonsuit is not.

8 Rep. 58. in Becher's case.

7. A *retraxit* must be always in person, for the entry is *venit & fatetur se nolle ulterius prosequi*; and therefore, if it is by *attorney*, it is error.

1 Cro. 551.

8. Two joint obligors; one was sued, and as to him a *retraxit* was entered, and afterwards the obligee brought an action of debt against the other, who pleaded this *retraxit* in bar to that action; and the better opinion was, that it was a good bar (*a*).

(*a*) Otherwise if they had been jointly and severally bound. *March* 95.

9. GODDARD v. SMITH.

[Mich. 3 Annæ.]

THERE is a short note of this case in 2 *Salk.*, but the case was as followeth:

2 Salk. 456. Where a non pros. is no discharge.

ss. *W. R.* being indicted for *barratry*, the attorney-general entered a *non pros.* (*viz.*) *quod attorn. generalis dominæ reginæ, ipsum inde non vult ulterius prosequi;* whereupon *W. R.* brought an action on the case against the prosecutor, for a false and malicious indictment prosecuted against him (the plaintiff) *et quod fuit debito modo inde exoneratus*, and at the trial gave this *non pros.* in evidence: *Sed per Curiam*, It ought to be an *acquittal upon the merits of the cause*, which was never tried in this case, and there was no default in the defendant in not having it tried: *Et per Holt*, Ch. Just. This is no discharge, it is only putting the defendant *sine die*, the attorney may take out new process if he will. *Sed per Harcourt, clerk of the Crown-office*, it was never yet done; *non pros's* have been frequent upon informations, but never upon *indictments*, till the reign of *Car.* 2., and the Court thought it hard that the attorney-general should allow them.

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10. CREE v. ROLL (*a*).

[Pasch. 13 Will. 3.]

IN ejectment against two defendants; afterwards, at the *nisi prius*, the plaintiff entered a *retraxit* against one of them, and the cause was tried against the other; adjudged, that before the record is sent down by *nisi prius*, either before or after issue joined, the plaintiff may enter a *non pros.* against one defendant where they sever in their pleas, but where they do not sever the plaintiff cannot enter a *non pros.* as to one of them.

Where a non pros. may be entered, where not.

(2.) That there cannot be a *non pros.* at the trial at the assizes.

(*a*) *Quære*, If this is not the same case with *Greeves* v. *Rolls*, 2 *Salk.* 456?

NOTICE.

1 Roll. Rep 469. contra. 1 Vent. 78. Where special notice must be given.

1. WHERE a promise was made to pay the plaintiff 20*l.* upon his return from *Hamburgh*, the plaintiff must give notice of his return, and allege it specially in his declaration (*a*).

2 Lev. 22. Williams v. Fry. Where a person is bound to take notice of a conditional limitation. 8 Co. 92. Cro. Car. 392. 1 Rol. Ab. 856. Mod. 87. 1 Ventr. 204. Carth. 172.

2. Devise to his youngest daughter in tail; *provided, that if she marry without the consent of W. R., then to his second son in tail;* the daughter married without the consent of *W. R.*, and the second son entered, and both are found to be infants, and also that the daughter had no *notice* of the condition: Adjudged, this is a conditional limitation, and that the second son might enter, and that want of *notice* will not excuse the daughter, because no one is bound to give her notice; and as she takes notice of the estate devised to her, so she is bound to take notice of the condition upon which she takes it; but it is otherwise where the devise is to the heir at law upon such a conditional limitation, because he may enter generally, as heir, not knowing there was a will.

[247] 1 Vent. 147, 200, to 205. 5 Co. 22, b. Cro. Eliz. 517.

3. Where a man covenants to make *W. R.* such an estate in *D.*, the covenanter ought to give notice to *W. R.* what manner of *conveyance* he intends; that if it be a feoffment, *W. R.* may be ready on the land to take livery and seisin.

1 Vent. 147.

4. So where a man covenants to *levy a fine* to *W. R.*, the covenanter must give notice whether he intends to levy it in court, or by *dedimus*.

5. An award, that *A.* shall make *B.* a lease, &c. within six months following, and that upon making thereof *B.* shall pay the other 50*l.*, *A.* needs not give notice when he will make the lease.

1 Vent. 204. 2 Lev. 52.

6. One married a *city orphan in Surry*, [*not*] knowing her to be such; adjudged, that he is punishable, because he is bound to take *notice*, that she was a *city orphan*, and the rather, because no body is bound to give him notice (*b*).

(*a*) There is a contrariety of authorities upon this subject. *Vide Com. Pleader*,(C) 75. vol. 5. 3d. ed. pa. 367.

(*b*) *R. ac.* with respect to wards in Chancery. 3 *P. Wms.* 115.

NUISANCE.

1. ARNOLD v. JEFFERSON.

[Mich. 9 Will. 3.]

IN this case it was held, *per Holt*, Ch. Just., That an assise or *quod permittat, &c. quære erexit quædam edificia*, is *good*, for there may be a building without a proper name; it lies *de * fabrica*, which is a word more uncertain than *edificia*, yet it will not lie † *de mole*, because the thing itself is not to be recovered as in a *præcipe*.

Assise where it is good, where not 2 Salk. 458.

* N. B. 184.

† 3 Cro. 402, 580.

2. *Stopping of lights* is a *nuisance*, but *stopping a prospect* is not; as for instance, one who had a house and lights time out of mind, the neighbour and owner of the next field built a shed, which stopped the lights, and then made a lease thereof to *W. R.*, against whom the plaintiff brought an action for this *nuisance: Et per Curiam*, admitting he might have an *assise of nuisance* against the builder, yet he cannot have an action against his lessee, because it would be waste in him to pull down the shed and abate the nuisance; but the plaintiff may stand on his own ground and abate it. *Et per Curiam*, Where the thing done is a nuisance *per intervalla*, as a *cock*, or *pipe*, or *gutter*, an action lies against the lessee, because every fresh running is a fresh nuisance; yet if *W. R.* have a *way* over the ground of *W. M.* and he stops that way, and then demises the ground to *C.*, an action lies against the lessee, for continuing this nuisance.

1 Mod. 54.
9 Co. 58. b.
Stopping lights where it is a nuisance, and how to be abated.
1 Roll. Rep. 22.

Dyer 320. a
2 Salk. 460.

3. A lord of a manor may build a *dove-cote* upon his land, parcel of his manor, and this he may do by virtue of his right, as lord thereof; but a tenant of the manor cannot do it without license, for he can have no right to any privilege that may be prejudicial to others; but this is not a *common nuisance*, nor *punishable in the leet:* But the nuisance being particular, the lord shall have an action on the case, or an assise of nuisance, as he may for building a house to the nuisance of his *mill*.

2 Cro. 491.
5 Rep. 104.
2 Roll. 193.
2 Roll. Rep. 5, 30. contra.
Who may build a pigeon-house, who not.

OATH.

Cro Eliz. 486. Difference where the oath is to do a spiritual and temporal thing.

ASSUMPSIT, &c. in case he would make oath before such a person, he promised, *&c.* *Et per Curiam, Oaths* are either by *compulsion* or *voluntary;* and a voluntary oath by the consent and agreement of the parties, is lawful; and in such case, if it is to do a spiritual thing, and the party fail, he is suable in the ecclesiastical court, *pro læsione fidei;* and if it is to do a temporal thing, he might formerly be punished in the Star-chamber, if he failed, and now in *B. R.*

2. HILTON *v.* BYRON.

[Pasch. 11 Will. 3. B. R.]

Quaker's solemn affirmation not allowable in criminal cases.

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THE plaintiff *Hilton*, being a *Quaker*, moved for an attachment against *Byron*, offering to make his *solemn affirmation*, according to the late act, that he went in danger of his life (*a*). *Sed per Curiam*, it was denied, unless he would take his oath in common form, for this being a criminal proceeding, it is out of the statute.

(*a*) *R. ac.* 1 *Str.* *Quaker's* affirmation disallowed in an appeal of murder, 2 *Str.* 854. So on a motion for an information, 2 *Str.* 872. So on a rule to answer the matters of an affidavit, 2 *Str.* 946. So on a motion for an attachment for nonperformance of an award, 1 *Str.* 441. Allowed on an affidavit in his own defence against a criminal charge, 2 *Burr.* 1117. In a penal action, *Cowper* 382. On a rule respecting the appointment of an overseer, 2 *Str.* 1219.

3. HIPPESLEY *v.* TUCK.

2 Lev. 184. T. Jones 81. Where error may be assigned contrary to the record. 13 Car. 2. cap. 1. 1 Wilson 85.

A WRIT of error was brought upon a judgment in an inferior court, of which court the mayor of the corporation was judge, and the error assigned was, that he had not taken the oaths pursuant to the statute 25 *Car.* 2., by which his office of mayor is made void for not taking the oath, and by consequence the judgment was *coram non judice;* it was insisted in support of the judgment, that this is not assignable for error, because it is contrary to the record by which he is admitted to be judge. *Sed per Curiam*, the statute makes the office void as to jurisdiction, and therefore this is assignable for error, though contrary to the record (*b*).

(*b*) *Dub.* 1 *Hawk.* c. 8. s. 3.

4. But since it hath been adjudged otherwise in a parallel case. *ss.* Error of a judgment in an inferior court, for that the sheriff who heard the cause, and was judge of the court, had not taken the oaths; the defendant pleaded, that the oaths were not *tendered* to the sheriff; and upon a demurrer to this plea it was adjudged good, because the statute requires, that the oath and declaration should be tendered to him to subscribe, and the tender is traversable (*a*).

2 Lev. 242. Dennis versus Norris.

(*a*) *Vide contra* 2 *Salk.* 428.

OFFICE.

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1. SAUNDERS *v.* OWEN.

IN arguing this case, which was upon a writ of error to reverse a judgment in assize for the office of *clerk of the peace* to the justices of *Kent*, it was held, that *anno* 12 *Rich.* 2. The clerk of the peace was called, the *clerk of the justices;* from which it may be inferred, that at that time there was no *custos rotulorum*, but all proceedings at the sessions were kept by the justices; that when by the statute * 34 *Ed.* 3. their proceedings came to be recorded, it was then necessary to have a proper officer who should be responsible for the *rolls*, and this was the *custos rotulorum*, who then had power to appoint a *deputy*, as incident to his office, and this is the *clerk of the peace:* But this being found to be a profitable office, the king did usually dispose of it; therefore, to prevent such disposals, this office was annexed to the *custos rotulorum* by the statute 37 *H.* 8.; and since that statute the *custos* hath always put in the *clerk of the peace*, appointing him to hold the same *durante placito suo;* so that he was removable at will, till by the statute † 1 *Will.* 3. he had a more fixed estate, which is *quamdiu se bene gesserit.*

2 Salk. 467. 5 Mod. 386. Of a custos rotulorum and a clerk of the peace.

* 34 Ed. 3. cap. 1. 1 Ld. Raym. 163, 164.

† 1 Will. 3. cap. 21.

2. SIR ROBERT ATKINS *v.* MOUNTAGUE.

ELEANOR, *queen-dowager of H.* 3. endowed *St. Catharine's Hospital* near the *Tower*, reserving to herself, *et reginis Angliæ nobis succedentibus plenem potestatem* of providing a *master* thereof: The *queen-dowager*, in the reign of *Car.* 2., nominated a master, and *queen-consort* taking that nomination to be void, she nominated another; it was

1 Chan. Rep. What office cannot be granted in reversion.

insisted, that such a desultory inheritance as this was, (*viz.*) *regnis Angliæ nobis succedentibus*, could not be good by charter, without an act of parliament. But *per Curiam*, this is very true, if it had been a grant of *advowson in esse*, or of lands, because he who had a right could not always know against whom to bring his action; but of a patronage newly founded there can be no precedent right; therefore it may be limited at pleasure, like a rent *de novo*.

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Vide Com. Dig. Officer, B. 13, 14.

2. It was held, that this office of a *master* could not be granted in reversion; and that the right of granting it was in the *queen-dowager*, and not in the *queen-consort*, unless there was no queen-dowager.

3. ANONYMOUS.

Office of marshal of B. R. cannot be granted to one for a term for years. 2 Jon. 127.

PER Curiam: The office of *marshal* of the King's Bench cannot be granted to one for a term for years absolutely, because in such case it might go to an executor or administrator.

But it may be granted to one for ninety-nine years, if he shall so long live (*a*), because there can be no inconvenience in such a grant, and the present marshal succeeded *Sutton* by virtue of such a lease.

(*a*) But a grant to one for 99 years, during the life of another person, is not good. 1 *Show.* 25.

4. GODOLPHIN *v.* TUDOR.

[Mich. 3 Annæ.]

S. C. 2 Salk. 468. 6 Mod. 234. Where a deputation is good, where not.

SIR *William Godolphin* being *auditor of Wales* for life, made the defendant his *deputy*, *quamdiu se bene gesserit*; and by articles of agreement between them, he the said defendant, in consideration of the said deputation, did covenant to pay to Sir *William Godolphin* 200 *l. per annum*, and to save him harmless, *&c.*, and entered into a bond for performance of those articles; and in an action of debt brought on that bond, the breach assigned was for non-payment of 200 *l. per annum* for so many years; the defendant pleaded the statute * of *Ed.* 6.; there was a replication, and a rejoinder and demurrer: And *per Curiam*, this is an office within the statute; but adjudged, that where the salary is certain, in such case, if the principal maketh a deputation, reserving a *lesser sum out of that salary*, such deputation is good notwithstanding the statute, so if the profits are uncertain arising from fees; if the principal makes a deputy, *reserving a sum certain out of the fees and profits of the office*, it is good; for in those cases, if the fees will not answer the reservation, the deputy is

*5 & 6 Ed. 6. cap. 16.

Vide H. Bl. Rep. 331.

not to pay: And though a deputy, by his constitution is intrusted with the whole office of his principal, yet he hath no right to the salary or fees, for they still belong to the principal; so that whatever he reserves to be paid out of them, is only a reservation of what was his before, and giving away the surplus to another; but where the reservation or agreement is to pay generally, *but not out of the* [252] *profits*, the sum reserved must be paid at all events, and in such case, it is void by the statute.

5. HUTCHINS, SERJEANT'S *CASE*.

[Pasch. 5 Will. 3.]

HUTCHINS being made *king's serjeant* by patent, during pleasure, with a salary of 40*l*. *per annum*, was afterward made one of the *commissioners of the great seal*, which commission being afterwards dissolved, the question was, Whether he should still take place as *king's serjeant;* and by the opinion of all the judges, his patent of king's serjeant is determined, because his commission put him into an office of judicature, which is inconsistent with the service and duty of his office to be performed as *king's serjeant;* and it is the same as if he had been made lord keeper or a judge.

King's serjeant made commissioner of the great seal, his patent as king's serjeant is determined. 3 Lev. 351.

6. If an *archdeacon* forfeits his right to grant the office of *register*, *per* 5 *Ed*. 6. against the sale of offices, the king shall take the advantage of that forfeiture without office found, for it was neither in the archdeacon, nor in the king as an estate, but only a power to nominate to the office; it is like a *chose in action*, and the present vacancy is a chattel separate from the inheritance.

1 Vent. 270. Where an archdeacon forfeits his right to grant the office of a register, the king shall have it.

7. *Tenant for life of the bailiwick of the Savoy* from the crown, made a lease thereof for a year to an *under-deputy*, and adjudged good; for by the statute 5 & 6 *Ed*. 6. *cap*. 16. all offices of fee are excepted, and so are all sub-grants and sub-demises thereof.

2 Lev. 151. offices in fee are not within the statute 5 & 6 Ed. 6.

8. In *false imprisonment*, the defendant justified as *deputy* to a constable; it was objected against this plea, that a constable could not make a *deputy*, for he is sworn to his office, and cannot give his oath to his deputy. *Sed per Curium*, A constable is but a ministerial officer; therefore he may make a deputy, for he may be sick, and so not able to execute his office in person, but returns must be made in the name of the immediate officer, and so they must in all ministerial offices, but not in judicial.

1 Roll. Rep. 274. Constable may make a deputy. Rol. Abr. 591. Moor 845. Cromp. 222.

ORDERS.

1. HARRISON v. LEWIS.

A poor man coming with a certificate into a parish shall not go back to the parish who certified, if he hath gained a settlement elsewhere.

MOVED to quash an order made at the quarter-sessions in *Coventry;* the case was, *Lewis,* with his wife and children were settled in the parish of *A.*, and from thence removed to the parish of *B.*, where *the husband gained a settlement;* but the parish of *A.* having given a *certificate* to the parish of *B.*, that they (the said parish of *A.*) would receive them again, whenever *Lewis* should become chargeable to *B.*, and he now being chargeable, they obtained an order from two justices to send him and his wife and children to *A.* again; which order was confirmed upon an appeal to the sessions, and he was sent thither accordingly, but the order was quashed; for though it was according to the *agreement* made between the two parishes, yet a *private agreement* in this case shall not alter the law.

2. THE KING v. PARISII OF ST. NICHOLAS IN ABINGDON.

Taxing alone, without paying, will not make a settlement. S. C. Skin. 629.

ONE *Dickenson* was an inhabitant of the parish of St. *Helens, in Abingdon,* where he had four children, and removed from thence into the parish of St. *Nicholas,* where he lived some time, and was *taxed to the poor* there, but was removed back to *St. Helens* before he paid the tax, and there he died, afterwards his children were by order of the justices removed into the parish of St. *Nicholas,* for that their father had gained a settlement there, by being * taxed to the poor, and this by virtue of the statute 3 & 4 *Will.* 3. But *per Curiam,* there must be *paying as well as taxing,* to make settlement by that statute.

* Statute 3 & 4 Will. 3.

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3. THE KING v. INHABITANTS OF WINSLY.

Sessions must either affirm or reverse an order. Postea 6. S. P.

ONE *Mary Tully,* a poor woman, was by order of two justices removed from *Beverly* to *Naseborough* (a) in the *West-Riding* of *Yorkshire,* that being adjudged by them to be the last place of her legal settlement: *Naseborough* appeals to the next sessions, and thereupon an order was

(a) Q. If this should not be *Knaresborough*?

made, reciting the difference between *Beverly* and *Naseborough;* but that appeared to them, that this woman was last legally settled at *Winsly*, which was a *third parish* not concerned before, and so she was by that order removed to *Winsly;* but it was quashed, because the sessions had no jurisdiction, but only to *affirm* or *reverse* the order between the contending parishes, and not to make an order to charge a third parish.

Vide Haine's case. Comb. 286. Qu. If same case?

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4. WOOTON RIVERS *v.* ST. PETER'S MARLBOROUGH.

THIS case is reported in 2 *Salk.;* but it was as followeth, (*viz.*) An order was made by *two justices* to remove a poor woman from the parish of *Wooton Rivers* to the parish of St. *Peter* in *Marlborough*, that being the last place of her legal settlement; which order being removed into *B. R.* by *certiorari*, these objections were made against it.

2 Salk. 492. S.C. 5 Mod 149. Objected against an order, that it did not set forth, that the person removed did not rent 10l. per annum and that it doth not say it was made upon the complaint of the parish officers, quashed for the last objection. *Cap. 12.

(1.) It is not said that the *woman was poor*, but only that she was *lame and likely to become poor.*

(2.) It is not said, that she did not *give security*, upon giving which she is not to be removed by the statute *13 & 14 *Car.* 2.

(3.) It is not said, that she did *not rent a tenement of* 10*l.* *per annum.*

(4.) The order was made upon *complaint* to the justices, but doth not say, upon *complaint of the churchwardens or overseers of the poor.*

But the two last objections were chiefly insisted on to quash this order.

Now, as to the renting a tenement of 10*l.* *per annum:* *Per Holt*, Ch. Just. Before the statute 13 *Car.* 2. the justices of peace removed poor people by consequence of law upon the *statute* 43 *Eliz.*, because it is provided by that statute, that every parish should maintain its own poor, therefore they considered who were properly the poor of a parish, and those were such as were settled a convenient time in a parish, and that a *month* was a convenient time to make a settlement: But there being several doubts made about this matter, therefore to settle the same the statute before-mentioned was made; upon which statute this question now arises (*viz.*) since the power to remove a poor person being not wholly founded on the statute 13 & 14 *Car.* 2., but on the law as it was before the making that statute, whether such an order as would serve for a removal before that statute, would serve since; or whether the statute obliges the justices to alter the form of their orders; and this depends upon the operation of the statute, whether it was by way of jurisdiction or

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restriction; and upon searching of precedents by the secondary he found, that the orders before this statute were all without this clause, and so were the orders since; whereupon, as to this point, this order was held good; and if the fact is, that the person removed *doth rent a tenement of* 10*l. per annum*, it ought to be remedied by way of appeal to the sessions.

But as to the last exception, that this order was made upon *complaint* only, and not upon complaint of the *churchwardens*, *&c.*, this was held fatal; whereupon the return of the *certiorari* was read, and there it appeared, that the order was made upon the complaint of the churchwardens and overseers of the poor; upon which it was urged, that this omission and defect in the order itself, should be supplied and made good by the return of the *certiorari*. But *per Curiam*, no man can disturb another coming into a parish, but he or they who have authority so to do; a *complaint ex officio* to a justice of peace is not sufficient, for it may be that the parish is willing, and do desire, to have the party amongst them; and if that be the case the justices cannot remove him; and though upon the return of the *certiorari* it is set forth, that this order was made *upon the complaint of the churchwardens and overseers of the poor*, yet that will not supply the omission in the order itself, because the justices had exercised their authority before the return was made, and they had no power to make such a return; they should only have returned the order *in hæc verba*, for which reason this order was quashed.

5. SCRIVENHAM PARISH *v.* ST. NICHOLAS.

Order quashed, for that it did not set forth, that the person was poor, &c.

AN order to remove a poor person was quashed, because it was not said that he was *poor*, or *likely to become chargeable to the parish*, *&c.* (*a*).

(*a*) *R. ac.* 2 *Salk.* 530.

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6. THE KING *v.* INHABITANTS OF OKING.

5 Mod. 208. 2 Salk. 473. Where the husband is settled, the wife and children must likewise be settled there.

ONE *James Tully, his wife and children*, were removed, by an order of two justices, from *Oking to Horsewell*, who appealed to the next sessions, and there an order was made to *supersede* the order of the two justices; and for that it did not appear to them, that the said *James Tully* (saying nothing of his wife and children) had a settlement at *Horsewell*, therefore they order him, and his wife and children, to be removed to *Oking:* These orders being removed by *certiorari*, it was objected, that the order ap-

peared to be made by the justices, &c., at the sessions holden for the *county of Surrey at Kingston-upon-Thames;* and it doth not appear by the order, that *Kingston* was in the *county of Surrey;* but the word *Surrey* being in the margin, this objection was overruled: The next objection was, that it doth not appear by the sessions order, but that the wife and children might be settled at *Horsewell*, for it only sets forth that *James Tully* had no settlement there, which may be true, for he may be a vagabond, and yet his wife and children may be settled there, the one by having a *freehold*, and the other by being *apprentices;* but *per Curiam*, this exception was disallowed; for wherever the husband is settled, there the wife must likewise be settled. In the next place it was objected, that the sessions having only power to * *repeal or affirm*, but not to *supersede* the order of two justices. *Per Curiam, Supersede* is not a proper word; there is a difference between a *supersedeas and a repeal;* a commission of *oyer and terminer* may be superseded, and revived by a *procedendo* without granting a new commission, but that cannot be done in case of a *repeal;* yet this word is commonly used among justices of peace upon such occasions; therefore they would not quash it, but referred it to a judge of assise.

* Sessions have power to affirm or repeal, but not to supersede an order. Antea 3. S. P.

7. THE KING v. ST. OLLAVE'S PARISHIONERS.

Order of removal ought to be directed to the officers of both parishes. 2 Salk. 493. S. C.

UPON a *certiorari* two orders were returned; the first was an order made by two justices, for the settlement of a poor man, *Thomas Gill*, in such a place, and the other was an affirmation of the first order upon an appeal to the sessions: the first order recited, That whereas complaint hath been made unto us, that *Thomas Gill* of the parish of *St. Ollave*, had lately intruded himself into the parish of *St. George*, &c. We adjudge him to be last legally settled in the parish of *St. Ollave;* these are therefore to require you, and every of you, to convey the said *Thomas Gill* to the parish of *St. Ollave;* and the order was directed to the *churchwardens and overseers of the poor of St. Ollave*, for which reason it was quashed; for the order ought to be directed to the *parish officers*, from whence the *person is to be removed*, and to the officers of the parish, who are to receive him only.

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8. LUCKINGTON v. ST. AUSTIN'S PARISH.

Where parents are dead the child must be settled where born. S. C. Comb. 380.

THE case was, *Simon Howell* was settled at *Luckington in Wilts*, but afterwards he and his wife came into the parish of *St. Austin* in *Bristol*, where he lived sometime, and had a child born there, which child was now *under the*

Sett. and Rem. 251

age of seven years; the father went to sea, and there died; the mother returned to *Luckington*, and there she died; two justices made an order to send the child to *Luckington*, that being the place where the father was settled, which order was confirmed upon an appeal; but Mr. *Northey* moved to quash this order of sessions, because the child must be sent to the place where it was born, unless it can be sent *to his parents*, where they are settled, which could not be done in this case, because they were both dead.

(*a*) By the other reports, it seems the case was not decided. It is now clearly established, that the child's settlement follows the father's.

9. TUDY *v.* PADSTOW.

[Pasch. 9 Will. 3.]

Sessions have no jurisdiction but by appeal S. P. 2 Salk. 479.

AN order made by two justices for settling a poor man at such a place, was quashed at the sessions; but because it did not appear, that it came before them by way of *appeal*, the order of sessions was quashed, for they have not original jurisdiction, but it must be brought before them by *appeal.*

10. BAYLY'S *CASE.*

[Hill. 10 Will. 3.]

Where the service was for more than a year, though not upon one contract, yet it is a settlement. S. C. Bur. Sett. ca. 549. Fortes. 316. Sett. and Rem. 255. 12 Mod. 224. Raym. 426. 5 Term.Rep. 98. [* 258]

A *MAID-SERVANT* before the 25*th of March*, 1707, was an inhabitant legally settled at *Overton in Hampshire*, and then contracted with one *John Opewood*, an inhabitant of *Steventon*, for so much wages, to serve him from the said 25*th day of March* till *Michaelmas* following, which she did accordingly, and then made a new contract with the same master, to serve him for a longer time, and accordingly did serve him upon that contract till *April following*, *in all above a year*. And *per Curiam*, though this was not an entire contract for a year, yet it gained her a * settlement at *Steventon*, according to the statute 9 *Will.* 3. *cap.*

11. THE QUEEN *v.* BRANWORTH.

[Mich. 3 Annæ.]

6 Mod. 240. S.C. A man is not indictable for being a vagrant.

BRANWORTH was indicted at *Portsmouth*, for wandering up and down there to sell wares as a *petit chapman*; and it was urged, that any *petit chapman* is a vagrant within the statute (*b*) 13 *Eliz.* if not exempted and

(*b*) 39 *Eliz.* c. 4.

qualified within the statute * 9 & 10 *Will.* 3.; and that the statute before-mentioned did not extend to *boroughs, or corporate towns*, so that as to these places a *petit chapman* remained as he was before (*i. e.*) a *vagrant*. *Sed per Holt*, Ch. Just. A man was not indictable for being a *vagrant*; but if he was suspected to be, or really was, a loose and disorderly person, he might be taken up and bound to his good behaviour, and by the statute of *labourers*, he might be put to work, or be compelled into service.

* Cap. 27.

12. SPENCER'S *CASE*.

[Hill. 8 Will. 3.]

Appeal must be to the next sessions.

AN *order* was made by *two justices*, to remove *Spencer* from *Hinckley in Leicestershire* to *Rochby in Warwickshire*, who appealed, and at the adjourned sessions, the two parishes agreed to put off the determination of the cause till the next sessions, which sessions vacated the order of the two justices; and now it was moved, to set aside that order, because the appeal ought to be at the next sessions, *per statute* 13 *Car.* 2. *and* 3 & 4 *Will.* 3. there to be finally determined; and for this reason it was quashed (*a*).

(*a*) The quarter sessions may adjourn the hearing of an appeal. Ld. *Raym* 81. 2 *Salk.* 605.

13. ELIZABETH ASHLEY'S *CASE*.

[Pasch. 9 Will. 3.]

2 Salk. 479. S. C. Order made by two justices, though not of the division, good.

TWO *orders* were removed by *certiorari*, the *return* whereof was quashed, because the return in the schedule annexed to the writ, was not made by *two justices*, but by the *clerk of the peace*, who was not the person to whom the *certiorari* was directed, and thereupon a new *certiorari* was granted; which being returned and filed, it was objected, that the order made by two justices to remove the poor man, &c. was naught, because it was not said, that it was made by two justices of the *division*, &c. according to the statute 13 & 14 *Car.* 2. But *per Curiam*, the statute as to this matter is only directory, it is not restrictive or qualificatory, as the word *quorum* is.

14. CUMNER PARISH *v.* MILTON PARISH.

[Trin. 2 Annæ.]

6 Mod. 87. S. C. 2 Salk. 528. S. C. Children which are legitimate are settled with their parents, and not where born.

A MAN settled at *Cumner*, and having several children born in that parish, afterwards removed to *Milton* with his children, and rented a farm of 10*l. per annum* there, by which he gained a settlement in the parish of *Milton;* and becoming very poor, his children born in *Cumner* were, by an order of two justices, sent thither, (*viz.*) those who were *under seven years old*, the justices apprehending that the place of their *birth* was the place of their lawful settlement; and this order being removed into *B. R.* by *certiorari*, it was insisted to maintain the order, that the children had gained a settlement in *Cumner by birth*, which was not altered or defeated by any subsequent act of their *father*, in gaining a settlement at *Milton*, for his children were with him there only as *nurse children*, and his settlement shall not be the settlement of his children: But, *per Holt*, Ch. Just. the place where a *bastard* is born is the place of his settlement, unless there is some trick to charge the parish; but the place where *legitimate children are born* is not the place of their settlement, for let that be where it will, the children are settled where their parents are settled; as for instance, if the father is settled in the parish of *H.*, but goes to work in the parish of *B.*, and before he gains any settlement there, has a son born in the parish of *B.* and then dies, this child shall be sent to the parish of *H.*, for it is not the birth, but the settlement of the father that makes the settlement of his child; and if the father hath gained a new settlement for himself, (as he had done in the principal case) he hath likewise gained a new settlement for his children, who do not go with him to his new settlement as *nurse children*, but as part of his family: And to what purpose is the father, upon coming into a new parish, to give notice of the number of his family, but only upon a supposition that these may gain a settlement there: But if a man is settled in the parish of *H.*, and has children born there, and dies, and afterwards the mother of these childen marries a husband, who is settled in another parish, the children shall go along with her, not as part of her family, but as nurse children, to be maintained at the charge of the parish where they were born, and where their father, whilst living, was settled, and to that parish they may be sent *after seven years old*, as to the place of their lawful settlement; for this accidental settlement of their mother, which was only by the marriage with a second husband, and as she is now become one person with him, shall not gain a settlement for her children.

15. MYNTON PARISH *v.* STONY STRATFORD.

[Mich. 13 Will. 3. B. R.]

A POOR man was sent by an order of two justices to *Mynton*, and upon an appeal to the sessions, that order was *discharged;* then by another order of two justices, he was sent to *Stony Stratford*, and upon an appeal to the sessions, that order was *confirmed:* Afterwards he was by another order of two justices, sent to *Mynton* again; and *per Curiam*, this last order is illegal; for *per Holt*, Ch. Just. Where an order is *discharged upon an appeal*, it binds only between the *contending parishes*, but where an order is * *confirmed on an appeal*, it is conclusive to all parties, for it is an adjudication, that the place to which he was sent is the last place of his legal settlement, which can never be avoided but by the parish against whom it was made; and that a parish in reputation is chargeable, if it hath officers, as churchwardens, *&c.*

2 Salk. 527. S.C. An order, which is discharged on an appeal, binds only the contending parishes, but if it is affirmed on an appeal, it is conclusive.

* Postea 21.S.P.

16. ANONYMOUS.

[Mich. 10 W. 3. B. R.]

AN order made to remove a poor man and *his family* from *H.* to *C.* was quashed, because all might not be removeable; for if a widow have children in a parish where she is settled and marrieth a husband settled in another parish, if those children are above seven years old, they are not to be removed.

Order to remove a poor man and his family quashed

17. TRACY *v.* TALBOT.

[Trin. 3 Annæ, B. R.]

A MAN took part of an house in the parish of *D.*, and was *rated* as an inhabitant of that parish, *&c.*, and a distress was had for *that rate;* and in *replevin* it was held, *per Holt*, Ch. Just., that if two houses are inhabited by two families, and there is but *one common door* where both enter, yet, in respect of their original, which is several, they continue several houses, and are severally rateable to the poor; and if one family goes away, the part where he dwelt shall be taken as an *empty house;* but if one house is divided by partitions, and inhabited by several families, as for instance, if the owner dwells in one part, and a stranger in another part, these are likewise several tenements, and the inhabitants thereof severally rateable to

6 Mod 214. S.C. 2 Salk. 532. Of houses rateable to the poor-tax.

the poor whilst they dwell in those several tenements; but if the stranger removes out of his part, and his family goes away, then the whole becomes an entire tenement, and the possession thereof is devolved on the owner, and he is rateable for the whole as one tenement, &c.

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18. THE KING v. RICELIP.

2 Salk. 524. S.C. 5 Mod. 416. S.C. Order confirmed upon an appeal is conclusive. * Antea 15. S.P.

THIS case is reported in 2 *Salk.*, but not as it is here reported: (*viz.*) A poor man was removed from *Harrow* to *Ricelip* by an order of two justices, which order was * *confirmed upon an appeal* to the next sessions, so that now he became settled at *Ricelip*; afterwards the parishioners of *Ricelip* discovering that *Hindon* was the place of his settlement, got an order from two justices to remove him thither; and upon a *certiorari* to remove that order into *B. R.*, the question was, Whether after an adjudication upon an appeal, *Ricelip* is estopped to say, that is not the last place of his legal settlement? and adjudged they are; for if *Ricelip* had not been the last place of his settlement, they could not have sent him there, but he would have been sent back to *Harrow*, which was first possessed of him, so that this is in effect but the same question again, which hath been already determined; and there must be an end put to it: If a man be adjudged by two justices to be the father of a *bastard child*, he is concluded to say the contrary so long as that order stands in force; and it is an estoppel to all men to say the contrary; but any man may say he is the father.

19. THE QUEEN v. CORBETT.

6 Mod. 91. S. C. Justices have power to make an order for wages, but not for work done. * Jones 47.

THE justices made an order, that *T. S.* should pay *E. G.* so much money for *labour and work done*; but did not set forth that *E. G. was servant* to the said *T. S.*, and for that reason it was quashed; for the justices have only an authority to order payment of *wages* to servants in * husbandry; but by this order it might be for labour and work done as a *carpenter* or *mason* in building.

20. THE QUEEN v. LONDON.

Order to pay so much for wages generally, shall be intended in husbandry.

AN order recited, that two men (naming them) were retained by Mr. *London*, the king's gardener, to work in the gardens in *Hampton-Court*, at so much *per diem*, and that they worked so many days there, for which so much was due, and which Mr. *London* was ordered to

pay; this order being removed from *Hick's-hall* into *B. R.*, it was quashed, because *the justices have no power by the statute† 5 *Eliz.* to order payment of wages to any labourers other than those who are employed in husbandry; and the reason is, because by virtue of that statute the justices may compel them to work in husbandry; and therefore it is reasonable that they should enforce the payment of their wages, especially since by the same statute they have power to settle the wages: *Et per Curiam*, Where an order is made for payment of *wages generally*, it shall be intended wages in husbandry (*a*); but where it appears to be otherwise, as it did in this order itself, it shall be quashed.

†Cap. 4

(*a*) *R. ac.* 2 *Salk.* 484.

OUTLAWRY. See Pleas, 16.

1. BY an outlawry, all personal chattels of the person outlawed are vested in the king by forfeiture; but real chattels of freehold estates are not vested in the king till after inquisition found.

Raym. 17. Hard. 101. See Briton versus Cole, Post. pl. 8.

2. Therefore, if the person outlawed do either alien or make a lease *before inquisition*, the king hath lost the pernancy of the profits.

3. *Outlawry* is a good plea to an *audita querela*, even upon that judgment upon which the party was outlawed, because the *audita querela* is not to defeat the judgment, but the execution:

1 Mod. 224. Sid. 43.

4. But if a *writ of error* or *attaint* is brought upon the judgment on which the party is outlawed, in such case outlawry is no plea, for by these the judgment itself is to be reversed and defeated; and then the outlawry, which is but a superstructure, falls; for the rule is, *non admittitur exceptio ejus cujus petitur dissolutio.*

Co. Lit. 128. a. 1 Sid. 43. Bac. Elm. 7, 8

5. An outlawed person was sued in the Exchequer by bill, to discover his real and personal estate for the benefit of the king; and upon a demurrer to the bill, because the defendant is not bound to accuse himself, this demurrer was over-ruled because the king has a title by the outlawry, which is *quasi*, a judgment for him.

Hard. 22

6. A person outlawed shall never be admitted to assign errors till he yields himself in execution, for he must give obedience to the law before he shall have the benefit of

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it; and he shall not have writ of error (a), because in such case he will have sight of the record; and if there are errors in it then he will appear, otherwise not: Now the outlawry is an *attainder*, and therefore he ought to appear in person, and submit himself to his trial; for being attainted, it must be *ex gratia*, if he is admitted to sign errors before.

Co Lit. 128.

7. *Nota:* At *common law*, there was no process of *outlawry*, but in cases of felony; and therefore, as by committing felony a man forfeited all his *lands*, *goods* and *chattels*, so by an outlawry for felony, at this time, he forfeits the same.

Comyns, Utlagry D. Forfeiture B.

8. But process of outlawry in personal actions is only by the statute, in which case the goods and chattels of the person are only liable, for those were only chargeable in personal actions, and so they are by an outlawry in those actions, (*viz.*) they are forfeited to the king, and he shall likewise have the pernancy of the profits of the chattels real (b); but this seems by a consequence only, for that the party being *extra legem*, is thereby become incapable to take the profits himself.

2 Vern. 512. 2 Lev. 49.

9. A merchant having 500*l.* stock in the *East India Company*, was outlawed before judgment at the suit of *W. R.*; the king upon inquisition and seizure, grants this stock to the said *W. R.* and that he might sue for it in his own name, *W. R.* gets the stock transferred to him, and then the merchant reversed the outlawry, and the king granted him restitution, *de omnibus quibus nobis non est responsum. Et per Curiam*, This shall not restore the 500*l.* stock, because the grant was executed and vested in *W. R.*, and as to that matter the king was answered.

2 Vent. 282.

10. *Case, &c.* upon a *quantum meruit* for meat, drink, &c. The defendant pleaded an outlawry in bar to the action, setting forth, that as *exigenda posita fuit, & utlagat', &c. & ea ratione, &c. debita juris forma waviata fuit & existit*; and upon demurrer to this plea it was insisted, that this outlawry could not be pleaded in bar to the action, it being an *assumpsit* upon the *quantum meruit*, because till the things are valued the debt is uncertain, and by consequence cannot be forfeited: It was doubted before *Slade's case*, whether a debt upon a simple contract could be forfeited by an *outlawry;* but in that case it was adjudged a good plea, because the consideration created a debt, though it was not reduced to a certain sum. Outlawry hath been held a good plea to an action of *trover*, and *even in bar* to that action, though all lies in *damages; but in the principal case the Court doubted, whether *debita juris forma waviata existit* (c), was too general or not.

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*3 Leon. 205.

(a) *Vide ac.* 4 *Bur.* 2527.

(b) After inquisition taken. 1 *Salk.* 395. *ante, pl.* 1.

(c) *Q.* Without setting forth that he did not appear on the exigent?

11. In a special verdict in ejectment, the case was: W. R. was outlawed in a personal action, and afterwards levied a fine, and the king seized the lands in the hands of the cognizee; and *per Curiam*, the seizure had been good if it was before the fine levied, but not after, for then the cognizee shall hold against the king.

1 Lev. 33. Ray. 17.

DYER. *See* Deeds.

PARDON.

1. THE KING *v.* WEEDON & AL'.

[Mich. 12 Will. 3.]

A CONVICTION of *barratry* renders a man *infamous*, and *incapable of being a witness*, but a *general pardon* will restore him. *Et per Holt*, Ch. Just. The difference between the effects of the king's special pardon and a general pardon is this, (*viz.*) wherever the *disability* is part of the judgment by act of parliament, as in conviction of *perjury upon the statute*, there the *king's pardon* cannot remove that disability, but a *general pardon* (*a*) may; but where the disability is only consequential, as upon an attainder, and no part of the judgment, there the king's pardon will take it away.

Difference between a general and a special pardon. Skinner 579. Tri. per Pais 160. ante 155.

2 Salk. 689. S.C. cited. Vide also 2 Salk. 691.

(*a*) *Viz.* by act of parliament.

2. DR. GROANVELT'S *CASE*.

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[Hill. 8 Will. 3. 1 Ld. Raym. 213. S. C. Comyns S. C.]

THE *censors of the college of physicians*, *London*, have power, by their charter, to *fine and imprison* for *male practice in physic;* and, this charter being confirmed by act of parliament, they accordingly did *fine and imprison Dr. Groanvelt*, for administering unwholesome pills and medicines; and in this case it was held, *per Holt*, Ch. Just. and the Court, that the king is *creditor pœnæ*, and that all *fines for* offences belong to him; and accordingly several lords

1 Salk. 144, 200, 263, 396. S. C. All fines in offences belong to the king.

of manors have the fines for all offences within their *seigniories*, but it is from the grants of the king, and that he may pardon the offence and remit the crime, for this is a *prerogative* which he cannot part withal; for as he hath the public revenge in his hand, so it is necessary, and for his honour, to have a power of mitigating or remitting the exercise of it.

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3. ANONYMOUS.

* Cap. 3. The king may pardon felony, and he who pleads it must find security for good behaviour. Cap. 13. Carth. 120, 121. 2 Salk. 499.

THE *king* may *pardon felony*; but then, by the statute * 10 *Ed.* 3., he who will have the benefit of such pardon must within three months after find sureties for his good behaviour by recognisance to be returned into the Chancery; if he doth not, then the pardon is void; but this statute is now repealed by the statute 5 & 6 *Will.* 3., by which it is provided, that *where a pardon is pleaded by any person for felony, the judge before whom it is pleaded, may at his discretion remand or commit such person to prison, there to remain* till he or she shall enter into a recognisance, with two sufficient sureties, for his or her being of the good behaviour for any time under seven years; and that an *infant or feme covert* pleading a pardon, shall find two such securities, who shall enter into a recognisance, as aforesaid.

Sid. 150, 168. 1 Saund. 275, 362. 1 Lev. 120. 2 Mod. 53.

4. If a man *commit felony*, and inquisition is taken, and then comes a general pardon, yet the forfeiture remains unless there are words of *restitution*.

Sid. 222. 2 Mod. 52.

5. Where a man is guilty of *simony*, and afterwards there is a *general pardon* for all offences which the king can pardon, yet the *parson* so guilty may be deprived, because *simony is malum in se*.

Sid. 170, 222. [*266]

* 6. So if a man *marries his sister*, he cannot be pardoned (*a*) *a parte ante*; yet he may be *divorced and punished* if he *cohabits* with her afterwards, for the subsequent cohabitation is a new crime.

1 Vent. 207. 2 Jon. 56.

7. Where a man is indicted for *treason* a pardon is good, though it doth not mention the indictment; but it is not so where the defendant is indicted for *murder*, for by the statute 27 *Ed.* 3. *cap.* 2. the pardon must recite the indictment.

1 Vent. 134. 1 Lev. 26. 2 Salk. 422.

8. Where a *statute pardon* contains *exceptions* in the body of the act, he who pleads such statute, to entitle himself to the benefit thereof, must aver himself not to be a person excepted; but where the exceptions follow in a distant clause by way of proviso, he needs not.

(*a*) Punished.

PARLIAMENT.

1. A *PROROGATION* of the parliament is always by the king, and in this case the sessions must begin *de novo;* but an *adjournment* is by each house, and the sessions continue notwithstanding such adjournment.

1 Mod. 242. Difference between a prorogation and an adjournment.

2. An order was made to apprehend *W. R.*, and to take him into custody, for arresting a person who claimed a *privilege under a peer*, and this arrest was six days *after a prorogation;* but upon an *habeas corpus* the person was discharged, because the order determined upon the *prorogation* as effectually as it would have done upon a dissolution, and so it is of all things executory and imperfect, except writs of error or *scire facias;* but if the person had been taken by the *serjeant at arms* before the *prorogation*, and that he must be, because it might happen that the parliament may be dissolved, and so the party may continue in prison for ever.

Sid. 215. Where an order of the house is determined on a prorogation.

3. If an offence be committed criminally in parliament, the person may be punished in *B. R.* after the parliament is ended; for *interest republicæ ne maleficia maneant impunita.*

Where a man may be punished after parliament is ended.

*4. If a parliament is assembled, and several orders made, and writs of error brought in the *House of Peers*, and several bills agreed on, and none signed, this is but a *convention*, and *no parliament*, or *session of parliament;* but every session in which the king *signs a bill*, *is a parliament*, and so every parliament is a session, but not *e converso.*

Hutt. 61. 1 Roll Rep 29.

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5. In the *House of Peers* their privilege begins from the *teste of the writ of summons*, and upon every session and prorogation their privilege is for *twenty days* before, and *twenty days* after a session, this being time enough for going to, and coming from any part of *England.*

2 Lev. 72

6. A writ of error returnable *ad proximum parliamentum*, is ill, unless the prorogation is to a *certain day.*

1 Vent. 266

PARTITION. See Jointenants, 15.

PAWN.

Noy 137. 1 Bulst. 9. 2 Salk. 522.

1. WHERE goods are *pawned* generally, without any day of redemption, and the *pawner dies*, the pawn is absolute and irredeemable; but if the *pawnee* dies, it is not so.

1 Roll. Rep. 215. Carth. 277. contr. 1 Salk. 379. contr.

2. Where goods are *pawned, redeemable at a day certain*, the pawnee, in case of failure of payment at the day, may sell them.

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3. ANONYMOUS.

[Pasch. 5 Will. 3.]

Where a pawnbroker may be indicted.

PER Holt, Ch. Just. Where a *pawnee* refuses upon tender of the money, to re-deliver the goods, he may be indicted, because, being secretly pawned, it may be impossible to *prove a delivery* for want of witnesses, in case he should bring an action of trover for them (*a*).

(*a*) Pawnbrokers are now regulated by *stat.* 27 *G.* 3. *ch.* 37.

4. COGGS *v.* BERNARD.

[Trin. 2 Annæ. 2 Ld. Raym. 909. S. C. Comyns 133. S. C.]

1 Salk. 26.

THERE is a case reported by this name in 1 *Salk.*, which see, for it doth not relate to what follows (*b*): *Per Holt*, Ch. Just. * *Vadium, a pledge or pawn*, in which case the pawnee hath a property in it, for the thing is a security to him, that he shall be re-paid the money lent on it.

* 2 Ld. Raym. 916

5. Now, if the thing pawned may be the worse for using, as clothes, &c. the pawnee cannot use them; but if it will not be the worse, as *jewels*, &c. he may use them, but then it must be at peril; for if the *pawnee* is robbed, he is liable to the *pawner*, because the pawn is so far in the nature of a *depositum*, that it cannot be used but at the peril of the *pawnee*, and it was the using that occasioned the loss.

6. But if the pawn is laid up, and the pawnee robbed, he is not answerable.

(*b*) But these points are stated in an anonymous extract from the same case. 2 *Salk.* 522.

7. If the pawn is of such a nature that the keeping is a charge to the pawnee, as a *cow or a horse*, the pawnee may *milk* the one, or *ride* the other, and this is as a recompence for his keeping.

8. If a creditor takes a pawn, he is bound to restore it upon the re-payment of the debt, but if his care of keeping it be exact, and the pawn is lost, he shall be excused, for there was no default in him.

9. And where the pawn in such case is lost, the pawnee hath still his remedy against the pawner for the money lent, for the law requires nothing extraordinary of the pawnee, but only that he shall take what care he can to restore the goods, upon payment of the money.

10. Therefore if a pawn is lost before tender of the money, the pawnee is not liable, unless there was an apparent default in him; but if, after the money tendered, the pawnee will keep the goods, and they are lost, the pawnee shall be liable, because his property is determined by the *tender*, and he is afterwards become a wrongful detainer; and he who keeps goods wrongfully must answer for them at all events at his own peril, for his wrongful detainer was the occasion of the loss.

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11. Where a man pawns goods for money lent, and afterwards a judgment is had against the pawner at the suit of one of his creditors, the goods in the hands of the pawnee shall not be taken in execution upon this judgment until the money is paid to the pawnee, because he had a qualified property in them, and the judgment-creditor had only an interest.

3 Bulst. 17. Com. Execution, c. 4.

12. And this is agreeable to *Southcott's* case, *ss.* Where a man delivers goods to another to keep safely, and they are afterwards stolen, he shall be answerable for them in an *action of detinue;* because, when they were delivered to him, he undertook to keep them safely, and therefore he ought to keep them so at his peril, though he hath no reward; but if he take goods to keep them as his own, and they are afterwards stolen, he shall not be liable; and the same law if they are pawned to him, because he hath a qualified property in them.

4 Rep. 83.

Vide Ld. Raym. 911. Coggs v. Barnard.

PERJURY.

1. BUXTON v. GOUCH.

[Pasch. 5 Annæ, B. R.]

Perjury how punishable.

IN this case it was held *per Curiam*, that perjury was punishable at *common law*, that if it relate to justice it is punishable by the *statute;* but if it relate to a spiritual matter in the spiritual court, it may be punished there (*a*).

Style 556.

2. That it takes its name from perverting justice, therefore it must be judicial; and a false oath in a court of justice is more odious than elsewhere.

5 Eliz. cap. 3. Sid. 106. 1 Hawk. c. 69. s. 20.

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*3. It is an offence for which the party may be indicted, either at *common law* or upon the *statute* 5 *Eliz.*, by which the punishment is enlarged, but the nature of the offence is not altered by that *statute;* and in many cases an indictment will lie at *common law* when it will not lie upon the *statute*, as for instance, a man may be indicted at common law, for a *false affidavit* taken before a *master in Chancery*, but not upon the *statute;* for this is not perjury within the meaning of that statute, for that must be in a matter *relating to the proof of what was in issue.*

Bulst. 322. 1 Cro. 352. 3 Cro. 137.

4. So where a witness for the king swears falsely, he cannot be indicted upon the statute, but he may at common law. 2 *Cro.* 120. *Peirce's* case.

2 Cro. 212. 3 Inst 164. 1 Hawk. ch. 69 s. 19

5. A false oath formerly taken in *the court of requests*, in a matter concerning lands, was not indictable, because that court had no jurisdiction in such cases.

Yelv. 120.

6. Indictment of perjury was, *quod tacto per se sacro Evangelio falso deposuit, &c.* this was adjudged ill, because it was not fully alleged, that he was sworn.

Cro. Eliz. 105.

7. Another indictment was held ill, because it did not allege that the defendant *voluntarie deposuit;* and † another was likewise adjudged naught, because the oath did not relate to the point in issue (*b*).

1 Cro. 147, 148. † 3 Cro. 157.

8. Where the plaintiff loses his action by a false and perjured witness produced on the part of the defendant, in such case he (the plaintiff) cannot have an action against that witness, till he is indicted and convicted, unless it was such a perjury, or in such a court, that an indictment would not lie for it.

Sid. 90, 451.

(*a*) This is expressly saved by *stat.* 5 *El.* c. 9. s. 12.

(*b*) These indictments were on the statute.

PIGEON. See Nuisance, 3.

PLEAS NOT CERTAIN, AND WANTING FULL DEFENCE.

1. HOLE *v.* BURGOIGNE.

[Pasch. 6 Will. 3.]

DEBT for 10*l.* shewing that in consideration he had paid the defendant the rent due to him, (*viz.*) 5*l.* he (the defendant) by his deed did covenant to save him (the plaintiff) harmless against *W. R.* who claimed the lands; and then sets forth, that *W. R.* did implead him **inter alia*, in the court of Exchequer, in an action of debt to recover this 5*l.* and upon a demurrer to this declaration, it was held ill, because the *inter alia implacitavit* was too general.

Plea inter alia, not good. Vide 2 Cro. 486.

*Postea Rent, 1 S. P.

2. *Want of defence* is only matter of form, and aided upon a general demurrer.

Want of defence is only form.

3. The defendant *venit & defend' vim & injuriam quando, &c.* and imparled specially, with *salvis omnibus advantagiis & exceptionibus;* it hath been held, that after this he cannot † plead *privilege*, because that would be to oust the court after a full defence; but in ‡ *Hardres* it is held otherwise, because a claim of *privilege* doth not oust the court of jurisdiction.

† Sid. 318. Vide 1 Salk. 1 Lut. 46.
‡ Hard. 565.

4. BRINGLOE *v.* MORISON.

[Hill. 27 Car. 2. B. R.]

IN trespass, for *taking his horse* and riding him immoderately; the defendant pleaded, that he took the horse by *license*, and gave no answer to the *immoderate riding*, yet adjudged good, for the *gist* of the action is the *taking*, and the immoderate riding is only an aggravation of the trespass.

Plea not answering the declaration, but only part of it, yet good. 2 Wilson 313. Ante 219. 3 T. R. 292.

5. SHEPHERD v. TAYLOR.

[Pasch. 9 Will. 3. B. R.]

How a judgment in an inferior court-baron is to be pleaded. Ante 219. S. C. in tot. verb.

IN replevin for six dishes; the defendant justified under a judgment in a *court-baron*, and a *levari facias* awarded thereon, by virtue whereof he took the dishes; and upon a demurrer to this plea it was adjudged ill; because an execution upon a judgment in a court-baron ought not to be by *levari facias*, but by *distringas*, unless there is a special custom for that purpose; besides, the plaintiff should not have begun with judgment, but with the *plaint* entered, and *taliter processum fuit superindc*, that there was a judgment.

Wilson 316.

6. HALLETT v. BURCH.

[Pasch. 9 Will. 3. B. R. 1 Ld. Raym. 218. S. C. Skin. 674. S. C.]

*Salk. 394.
†2 Salk. 580.
Where the plea amounts to the general issue.

THIS case is reported in *1 *Salk.* by the name of *Holler* v. *Bush*, and in †2 *Salk.* by the name of *Hallett* v. *Burt*; but the case was thus.

ss. *Trespass* for taking his cows, *&c.* The defendant pleads and sets forth a right by *prescription in the Bishop of Salisbury*, to grant replevins in such a manor, and that the plaintiff *cepit & imparcavit* three cows of another, and that he (the defendant) by virtue of a *replevin*, as *steward*, *&c.* took and drove them away, and traversed that he was guilty *aliter vel alio modo;* and upon demurrer to this plea it was objected, that it amounts to no more than the *general issue;* for the effect of it is, that those were the cows of another person, and that the plaintiff took and impounded them: Now by the impounding the plaintiff had neither title or possession, and if so, he had no ‡colour to bring an action of trespass for taking them out of the pound, for in such case trespass will not lie, but *parco fracto*. *Et per Curiam*, This plea amounts to *no more than the general issue*, wherever the defendant's plea leaveth a cause of action in the plaintiff either express or implied, but confesseth and avoideth it, the plea is good, and this confession and avoidance is colour, without which the plea would amount but to the general issue: Now in the principal case the defendant hath set forth in his plea, that these were not the plaintiff's cows, but yet, that he took them and *imparcavit* only, whereby they became *in custodia legis*, and therefore there was no colour for him to bring an action of trespass for taking them out; but if the defendant had pleaded *cepit & detinuit*, instead of *imparcavit*, the plea might have been good.

‡3 Cro. 329.

7. HATTON *v.* MORSE.

[1 Annæ. B. R.]

THERE is a short note of this case in 1 *Salk.*; but the case was thus: *ss. In assumpsit, &c.* The defendant pleaded, that true it is he did promise, but that *ante diem impetrationis billæ*, he paid the money; and upon a demurrer to this plea it was objected, that it amounted to the *general issue*. But *per Holt*, Ch. Just. This doth not amount to the general issue; for though *payment may be given in evidence upon non assumpsit pleaded*, yet it was long before that obtained; it is likewise *giving colour*, for he says, there was a promise, but that he performed it: Now there are many things which may be *given in evidence* upon the general issue, and yet those things may be pleaded specially: As for instance, In an action of debt the defendant may plead a *release*, or he may give it *in evidence* upon *nil debet* pleaded; so in *debt for rent* upon a *demise*, the defendant may plead an *entry and eviction*, before any rent became due, or he may give it in evidence upon *nil debet*.

2 Salk. 394. S.C. Where a plea doth not amount to the general issue.

8. There are two sorts of *colour*, the one is *express*, the other *implied*.

Of giving colour. 1 Ld. Raym. 551.

9. *Express*, as in trespass *quare clausum fregit*, the defendant in pleading makes a title under *W. R.* setting forth, that the plaintiff claims under a feoffment from the said *W. R.* by which nothing passed, but that he entered by colour thereof: Now here the defendant gave *colour of action* to the plaintiff, because by the feoffment he was tenant at will, and entered, and by virtue of his possession he may maintain an action against every one, but not against him who hath a right; so likewise in trespass *quare clausum fregit*, if the defendant pleads, that the plaintiff was seised, &c. and made a lease to him for years, there is no occasion to give express *colour*, because the defendant allows, that the plaintiff hath the reversion, which is colour enough.

10. HORNE *v.* LEWIN.

[Hill. 12 Will. 3. 1 Ld. Raym. 639. S. C.]

IN *replevin*, the defendant avowed the distress taken for *rent arrear*; the plaintiff replied, *de injuria sua propria, absque hoc* that any rent was in arrear: and upon a special demurrer to this replication, because it amounted to no more than the *general issue*, it was adjudged, that this was not a proper inducement to the traverse, as if in trespass the defendant should plead, *de injuria sua propria*, *absque*

2 Salk. 538. S.C. Where it amounts to no more than the general issue.

hoc quod est culpabilis, so that in the principal case, the plaintiff should have replied, *riens in arctro*, and conclude to the *country*, that had been the proper issue, for it is a negative to what was before affirmed. So * *de injuria sua propria*, *absque hoc* that there was such a prescription, is ill, and † *de injuria sua propria*, *absque hoc* that he is a bailiff, is ill; therefore the natural and proper replication to this avowry, had been *nihil in aretro;* it is *quasi* the general issue, so that this replication of special matter, (*viz.*) *de injuria sua propria*, amounts only to the general issue, and no other evidence can be given, but what might as well have been given upon the proper issue; besides, this circumlocution must be ill, because it prolongs the cause by enforcing the avowant to an unnecessary rejoinder; and though it is only matter of form, because it doth not alter the evidence, yet upon a special demurrer, and shewing it for cause, it is naught.

* Rast. Ent. 557, 558.

† 1 Roll. Rep. 46.



911. WEST *v.* WEST.

[Pasch. 12 Will. 3. 1 Ld. Raym. 674. S. C. Holt 559. S. C.]

Where the general issue is pleaded and not entered within four days, the defendant may waive it, and plead specially. Ante 211. S. C. 2 Wils. 204, 254. 1 Wils. 177. Str. 906, 1267, 1271.

IN an action on the case for a false return, the practice was agreed to be, that if one pleads the general issue, and it is not entered, he may within four days of the term waive it, and plead specially, and if *Sunday* happen to be the last of the *four days*, then *Monday* shall be allowed; and so in case of a plea in *abatement*, and that at any time afterwards he may waive the special matter and plead the general issue, unless there is a rule to plead as he will stand by it.

2 Lutw. 1178. How a release is to be pleaded.

12. Where the plaintiff releases after the action brought, the defendant ought not to plead *actio non, &c.*, but *actionem prædict' ulterius habere non debet*, and he ought to plead it either as a release made *pendenti brevi*, or *puis darrien continuance;* and so it is of any matter which happens either to abate the writ, or to bar the action after the writ brought.

2 Lutw. 1181. Of justification under an act of parliament.

13. Where by an act of parliament a man has leave to justify in general, that he acted by virtue of such a statute, according to the tenor of the act, he need not allege particular circumstances; but if he doth, and without taking notice of the act, it is a waiver thereof, and his plea must be taken as at common law.

2 Lutw. 1230. Plea that he was seised, but doth not say of what estate, not good.

14. *In replevin*, for taking in *Overfield*, *&c.;* the defendant pleads, that he was *seised* of three acres of land in *Overfield*, but doth not say *in fee*, or of what estate he was seised; and, upon a general demurrer, the plea was

adjudged ill for that cause,* but to a plea in bar of an action of trespass it was otherwise adjudged.

*2 Lut. 1313.

15. *Trespass* for breaking thirty perch of hedge and thirty perch of ditch; the defendant prescribes for a *way*, and that *ipse aperuit convenientem & necessariam viam* in the place where, *&c.*, for carriages, *&c.*; and, upon a demurrer to this plea, it was adjudged ill, because he might have laid out a convenient way without breaking thirty perch of hedge.

2 Lut. 1350. Justification for a way not well pleaded.

16. *In trespass* for breaking his house and close at *D.*, the defendant pleads, that the house and close aforesaid was a messuage, called *Raine's Dwelling-house*, and twenty acres of land, called *Raine's Close*, which said messuage and twenty acres of land, was *solum ipsius proprium per quod, &c. Et hoc paratus est verificare*, the plaintiff replies, that they were *liberum tenementum ipsius the plaintiff*, and that the defendant entered *de injuria sua propria*, and traversed that they were the freehold of the defendant, *& hoc paratus est verificare;* it was held, that this replication was not in the nature of a new assignment, because that is not always of another place, but here the place was still the same, and therefore the bar must be taken as a real and not a common bar, and consequently the replication ought not to conclude with a traverse, but should have put the matter in issue, (*viz.*) that it was his freehold, and not the defendant's freehold; and so concluded to the country.

2 Lut. 1402. Where it must conclude to the country.

Str. 871. Doug. 95. n. [92.]

17. In covenant, the breach assigned was, *non*-payment of rent and not *repairing;* the defendant pleaded an *outlawry* in bar to the action: *Et per Curiam*, He might have pleaded it in bar to the rent arrear, but not to the *repairs*, because the damages for not repairing were not forfeited by the outlawry, and by consequence the plea being in bar, and not being good as to part, must be ill in the whole; but if the defendant had pleaded this outlawry *in abatement*, as he might have done before *imparlance*, and this to the whole writ, it had been good, but it is not so in bar.

1 Lut. 513. Where an outlawry pleaded in bar is not good.

POOR PRISONERS. See Statute, 6.

POWERS. See Common Recovery, 2.

Powers are appendant or collateral.

1. POWERS are either *appendant* or *collateral*, the one is where the testator devises to *W. R.* for life, with a power to make a jointure, *&c.*; the other is where he devises to his executor to sell, *&c.*: In the first case the power is annexed to the estate, and derived out of it; in the other case it is collateral to it.

2 Lev. 58. King v. Mellin. Power, where destroyed.

2. As for instance, a devise to *W. R.* in tail, remainder over, with a power given to him to make a jointure to a *second wife*, *&c.* The tenant in tail, in the life-time of his first wife, suffered a *common recovery* to the use of himself and his heirs, then his wife died, and he married a second wife, and covenanted to stand seised to the use of himself and *his wife*, *for their lives*, *&c.*; adjudged, that this power, when created, was to be executed out of the estate-tail, which was now destroyed by suffering the recovery, and by consequence the power to make a jointure was destroyed.

Sid. 107. Of powers to make leases. Ca. Ch. 18

3. *Power* was given by a marriage-settlement to a jointress to make leases for twenty-one years in *possession*: the husband died, and she married again, and then the second husband died, and she married again, and then the second husband and wife made a lease, *&c.* in possession; but some of the lands were in *lease before*: Adjudged, that the lease was void as to those lands.

Yelv. 222.

4. If such power had been to make leases generally, it shall be intended leases in possession.

Ch. Rep. 18. Power not well pursued. Vide 1 Rol, Ab. 329.

5. The *Lady Antrim* being a single woman, settled her estate for life, remainder to her in tail, with a power to make leases (being sole) for three lives, *&c.* Afterwards she married, and then she and her husband made a lease, *&c.* for payment of debts: *Et per Curiam*, This is void, being *not pursuant to the power*, for the lease of *the husband and wife* is the lease of the *husband*, and the difference is between a *naked power* and a *power* which arises from an *interest*; for if a woman hath only a naked or bare power, as by a will to sell lands, she may sell, though she marry, because this is not a power created out of any interest; but where a power is reserved upon a settlement, she must execute it pursuant to that power when it was at first reserved.

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3 Ch. Rep. 18, 263, 346, 347. Smith v. Ashton.

6. In the following case there seems to be a contrary resolution: *ss.* The father being seised of lands in fee, settled the same to the use of himself for life, remainder to his eldest son in tail, with a *power to make* leases, or by

his last will under hand and *seal*, to charge it with 500*l.*; afterwards, by his will in writing, *but not sealed*, he charged it with 500*l.*, for his younger children, who, upon a bill exhibited against the heir, had a decree for the money, though it was objected, that this settlement was wholly voluntary: But *per Curiam*, The power is well executed, for the substantial part of it is to do the thing; and the neglect of a circumstance shall not avoid it in a court of equity, and the rather, because such powers are not like conditions, strictly to be expounded, but favourably to be construed for the benefit of the children; and yet a purchaser might defend himself against such a power not well executed, especially if he had no notice of it at the time of the purchase made.

Vide 1 P. Wms. 490.

7. Adjudged, That where the testator gives another a power to sell lands, he may sell his inheritance, because he gives the same power he had himself, and in such case the purchaser shall be entitled by the will.

2 Rep. 53. Power to sell lands.

8. But there is a difference where lands are devised to *executors to sell*, and where the devise is, that *his lands shall be sold by his executors;* for in the first case an interest passes to the executor, because the lands are expressly devised to him; but in the other case they have only an authority to sell, and if * one dies, the other cannot make a title (*a*).

Golds. 2. Dyer 219. Moor 61. 1 And. 145.

* 1 And. 145

(*a*) *Vide* Mr. *Hargrave's* Note upon this subject. *Co. Lit.* 113.

9. NORRIS *v.* TRIST.

IN ejectment, the case was: *ss.* A feoffment was made to three, *habendum* to two for their lives, remainder to the third person for his life, and a *letter of attorney to give livery and seisin to two*, but the attorney made livery to all *three;* it was objected, that the power was not well executed, and therefore no livery was made, because the power was not pursued: *Sed per Curiam*, It is true, that the former opinions have been, that powers must be exactly pursued, but yet † indorsing livery and seisin was always favourably expounded to support the conveyance, therefore this livery is good for the lives of two, and being made *secundum formam chartæ*, the remainder shall be good for the third person.

2 Mod. 78. Power good, though not strictly pursued.

† Sid. 428.

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PRESCRIPTION.

Grot. lib. 2. cap. 5. What makes a prescription.

1. TIME of itself can never be the efficient cause of any thing, for nothing is or can be done *by time*, though every thing is done *in time;* therefore by consequence it is not the length of time that begets the right of prescription, but it is a presumption in law, that a possession cannot continue so long quiet and not interrupted, if it was against right, or injurious to another.

1 Vent. 264. Prescription, that occupiers have repaired fences, good, without shewing any title in them. Vide Carth. 85. 1 Rol. 105. 1 Salk. 335.

2. The plaintiff declared, that the *occupiers* of the adjoining field have time out of mind *repaired the fences*, which being out of repair, his (the plaintiff's) beasts escaped out of his own ground, and fell into a pit; this is good, without shewing *any estate in the occupiers*, but it had not been so if the defendant himself had prescribed.

2 Lev. 164. But a custom for farmers of such a farm to find cakes, &c. not good.

3. And yet a *custom*, that the *farmers of such a farm* have always found *cakes and ale* to the value of 8*s*., or thereabouts, at *perambulations*, was held naught, because it is no more than a prescription in *occupiers*, which is not good in matter to charge the land.

2 Lut. 1346. Prescription for inhabitants, &c. to repair a way. 3 Cro. 664.

March 16. 3 Lev. 160.

4. *Prescription* by the *inhabitants* of a parish to dig gravel in such a pit, which is the soil of *W. R.;* it was doubted, whether this was good, or not, though it was to repair the highway; but yet inhabitants may prescribe for a way, and by consequence for necessary materials to repair it; and so they may for a watering-place; and so they may to take rushes in the land of another to strew the church; and so may *masters of ships* to dig ballast in the port of *Lynn*, for this is for the public good.

2 Vent. 186. Prescription in occupiers, &c. to have a way from one house to another, not good.

5. In trespass, the defendant pleads, that within the parish of *H.* all *occupiers* of such a close *habent & habere consueverunt* a certain way leading over the plaintiff's close to the defendant's house; this was held ill, for it is not like a prescription to a way to the church or market, which are necessary, & *pro bono publico.*

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6. HILL *v.* ELLARD.

[Mich. 16 Car. 2. B. R.]

Prescription for common for four cows, is good for one cow.

IN *replevin*, for taking *a cow*, the defendant justified under a prescription to have common in the place where, *&c.* for four cows and *half a cow;* and upon a de-

murrer to this plea, it was adjudged to be very absurd to prescribe for common for *half a cow;* but having prescribed to have common for *four cows*, that was sufficient to justify for *one cow.*

7. The defendant pleads, that he was *seised, &c.*, and that he and all those whose estate he had, *&c.* have used to have pot water, *&c.* Adjudged ill, because a prescription cannot be annexed to an *estate for years*, and he doth not say that he was *seised in fee.*

4 Mod. 318 Prescription cannot be by one who hath an estate for years. Postea 9. S. P. Co. Lit. 213. b.

8. The *inhabitants* of *E.* joined in a claim of common by prescription, *&c.*, and it was held, that tenants in *ancient demesne* may join in such a claim, because the king cannot claim for them; but, in the principal case, all the copy-holders to one lord ought to claim in and by that lord, and that lord ought to prescribe for him and his tenants, (*i. e.*) for his copyhold tenants, because he hath the freehold himself; but the lord cannot claim or prescribe for the freeholders, for they have a freehold in themselves; besides, *inhabitants* can never prescribe for common, or other profit apprender, but only for matters of *easement.*

Jones 176. Tenants in ancient demesne may join in a prescription for common. 4 Co. 31. b.

9. *Prescriptions* are properly personal, and therefore are always alleged in the person of him who prescribes, (*viz.*) that *he and all those whose estate he hath, &c.;* therefore a *bishop* or parson may prescribe *quod ipse & prædecessores sui*, and *all they whose estates, &c.*, for there is a perpetual estate, and a perpetual succession, and the successor hath the very same estate which his predecessor had, for that continues, though the person alters, like the case of the ancestor and the heir: But a *tenant for life or *years* cannot say *quorum statum ipse habet*, because he hath a new and distinct estate from his predecessor, and so it is of all tenants at will, and inhabitants, *&c.;* therefore they must refer to the *place* by way of *custom.*

Prescriptions are always alleged in the person.

* Antea 7.

PRESENTATION. [280]

1. IF the defendant, or any stranger, presents a clerk pending a *quare impedit*, and afterwards the plaintiff obtains a verdict and judgment, he cannot by *virtue of that judgment* remove him who was thus presented, but he may bring a *scire facias* against him to shew cause *quare*

Sid. 93. Of a presentation pending a quare impedit.

executionem non habet; and then, if it be found that he had no title, he shall be amoved. Now the way to prevent such a presentation is to take out a **ne admittas* to the bishop, and then the writ *quare incumbravit* lies against such an *incumbent*, who by virtue thereof shall be amoved, and put to his *quare impedit*, let his title be what it will.

1 Cro. 93. *Ne admittas.

2. Where a man gets the fee to his presentation, which is his title, he must in his declaration allege the presentation to be *tempore pacis*, for otherwise it may be intended to be *tempore belli*, and then it is no title, but only in pursuance of a former right, in such case he may allege it generally.

1 Mod. 130. 2 Mod. 183. How the plaintiff must declare on a presentation.

3. As for instance, where a man declares, that *W. R.* was seised of the manor of *D.* as *of fee*, to which an advowson was appendant, and that being so seised he *presented W. R., and* afterwards granted the next avoidance to the plaintiff; this is good, for here the plaintiff shews a precedent right, and doth not make the presentation itself his title.



4. HOLT *v.* BISHOP OF WINTON.

3 Lev. 47. S. C. Where the incumbent is likewise patron and dies, his heir, and not his executor, shall present. 2 Wilson 194.

IN a *quare impedit*, the case was, *ss.* The *incumbent* being seised of the advowson of the same church in fee, died, and the question was, Who should present, his *heir at law* or his *executor?* And, upon a demurrer, it was objected against the right of the heir at law, that he could not present, because the advowson did not descend to him till after the death of his ancestor, in which very instant of time the church was void; and therefore the avoidance was severed from the inheritance, and vested in the executor. *Sed per Curiam*, The heir shall present, because at the same time that the avoidance vested in the executor the inheritance descended to the heir, and where two titles concur in an instant of time, the *elder* shall be preferred (*a*).

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(*a*) Wherever it is a measuring cast between the heir and executor, the former shall be preferred. 2 *P. Wms.* 176.

PRIVILEGE.

1. IN the *Court of Exchequer* there are three sorts of persons who are privileged, (*i. e.*) *debtors to the king*, *officers*, and *accomptants*; against the first of these persons any man who has a privilege in another court, as an officer or attorney thereof, shall have his privilege, for the privilege of a person *as debtor* is but a general privilege; it was at first only for the benefit of the king, which is now disused, and a *quo minus* is no more than a common action in this court.

Hard. 365, 507. Of privilege of the Court of exchequer.

2. *An accomptant* entered upon his accompt, and adjudged, that he shall have his privilege till the *accompt is over*, because his attendance here *de die in diem* is necessary to pass his accompt, and the king has an interest in his attendance; but when the accompt is finished, and become a debt by being reduced to a certainty, he then hath no other privilege than a general debtor.

Ibidem.

3. If an officer commence a suit here, no privilege in any other court shall prevail against it, because his attendance is requisite here, and his privilege is first attached in this court.

2 Brownl. 267. 4 Leon. 193. Hard. 117. Godb. 81.

4. *Sir Edmund Sawyer* being *presented in Eyre*, delivered in a *supersedeas* for his privilege, *as one of the auditors of the Exchequer;* to which it was objected, that he ought to plead his privilege if he had any, for the privileges of the *Exchequer* are all in the *red book;* and the order is, that if an officer of the *Exchequer* is impleaded elsewhere, that a baron coming with that book, and shewing the order, and also avowing the person to be an officer of that court, the privilege shall be allowed without any plea, but where the book is not produced the privilege must be pleaded; but if the defendant in this case had pleaded his privilege, it was a question, whether it would have been allowed, because he was an *auditor* of the new revenues, and none of the *ancient auditors.*

Jones 288.

5. * An *attorney* or *philazer* of the common Pleas, if *sued* in *B. R.*, may plead his privilege, because they owe a personal attendance to that court; but a *serjeant at law* being sued in *B. R.* he cannot plead his privilege of *C. B.*, for he may sign pleas, be assigned of counsel, and practise in other courts *in Westminster-Hall;* but if he is sued in any *inferior court*, he shall have his privilege.

1 Mod. 298. Privilege of serjeant or attorney of Common Pleas. 2 Lev. 129.

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6. Where an officer of the court of *C. B.* is sued jointly with a *stranger*, who hath no privilege, in such case, the officer so sued shall not have his privilege.

Ibidem. 1 Vent. 298. 1 Vern. 246. Bro. Priv. 7, 9, 12.

7. KIRKHAM *v.* WHEELY.

[Trin. 7 Will. 3. B. R. 1 Ld. Raym. 27. S. C.]

2 Salk. 543. S. C. Where a plea in the negative, and without full defence, is good.

IN an action *qui tam, &c.* the defendant *in propria personæ sua dicit*, that he is an *attorney of the Common Pleas*, and that the attorneys of that court have time out of mind *not been suable* elsewhere: And, upon a demurrer to this plea, it was objected, that it was pleaded in the *negative*, (*viz.*) That attorneys of the court of Common Pleas, *&c.* have *not been suable* elsewhere, and no jurisdiction is given or shewed to any other court: Another objection was, that the defendant hath not made a *full defence*, for he only said *in propria personæ sua dicit*, when it should be *venit & dicit:* And the last objection was, because the king is made a party in this action, and he hath privilege to sue where he pleases. *Sed per Curiam*, This plea in the *negative* is well enough, because the privilege, if traversed, is not triable by the country, for it is matter of law, and there is a jurisdiction given to the Court; as to the second objection, *venit* is no part of the plea, and therefore it may be omitted; but the plea begins by the word *dicit*, and therefore that alone is sufficient: And, as to the third objection, it is true, the king is entitled to bring his action where he pleases, but the informer is not; for if he die there is an end of the suit, and the king is not entitled till recovery had, and prosecutors *qui tam, &c.* are looked upon as *informers.*

Privilege allowed in a qui tam action. S. C. 2 Salk. 30.

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8. BAKER *v.* SWINDON.

[Mich. 10 Will. 3. C. B. 1 Ld. Raym. 399. S. C.]

Two sorts of privilege, (viz.) of court and of process. Postea 10. S. P. S. C. Holt 580.

IN this case it was held *per Holt*, Ch. Just. that *privilege* is either of *court* or of *process*, as in the court of Common Pleas, every person who belongs to that court, as *attorneys*, their *clerks, &c.* shall have the privilege of being sued there, and not elsewhere; and this is the privilege of court: But none shall be allowed the privilege of *process*, but those who are officers of the court, and are supposed to be always attending there.

9. EDWARDS *v.* COPLAND.

[Pasch. 6 Will. 3. B. R.]

Where privilege may be pleaded per attornatum.

IN an action on the case, the defendant pleaded to the jurisdiction of the court, that he is an *attorney* of the *court of Common Pleas*, and ought to be sued there, *&c.*

the plaintiff replied, that he (the defendant) is not an attorney of the Court of Common Pleas, and concludes to the *country*, and upon demurrer to this replication, the rule was for the defendant to answer over, for it is a good traverse and conclusion; and in this case it was held, that the defendant might plead this privilege *per attornatum*.

10. WILLIS *v.* BATTERSHELL.

[Trin. 6 Will. 3. B. R.]

IN assault and battery the defendant pleaded to the jurisdiction of the court, that he is one of the *clerks of* J. COOK, *prothonotary of the Court of Common Pleas*, *quodq. ipse & omnes hujusmodi clerici de eadem Curiæ*, ought not to be impleaded but in that court; and upon a demurrer to this plea the plaintiff had judgment, because the defendant did not allege himself to be a clerk of the Common Pleas, to whom this privilege (as he pretended) did belong, but only that he was clerk to a prothonotary of that court, and *B. R.* will not intend the privilege to be other than as he hath pleaded it.

Privilege not well pleaded.

Vide Fort. 342. Str. 546.

11. * OGLE *v.* NORCLIFFE.

[Pasch. 2 Annæ, 2 Ld. Raym. 869. S. C. Farres. 97. 1 Salk. 4. S. C.]

THERE are two sorts of privilege in the Court of Common Pleas: *Per Holt*, Chief Justice, the one is of the officers of that court, to be sued there by bill, and the other is of their clerks, to be sued there, and not elsewhere, *by original*.

Two sorts of privilege. Antea 8. S. P. Post. 285. 3 Lev. 398. Lutw. 196. 2 Salk. 544, 546.

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12. ELDERTON'S *CASE.*

[Mich. 2 Annæ, B. R. 2 Ld. Raym. 978.]

HE was committed by the *Board of Green Cloth*, for executing a *fieri facias in Whitehall;* and upon a *habeas corpus* it was argued to be a lawful execution of the writ, and not prejudicial to the privilege of the *palace;* and that admitting it was a breach of the peace, yet the *Board of Green Cloth* had no power to commit this person, because he was not the *queen's servant*, and that court hath only a power over the queen's family, for the government and ordering her menial servants, and that the privilege of *Whitehall* was created by the statute 28 *H.* 8. *cap.* 12.

6 Mod. 73. S. C. Privilege of a king's palace. Antea Commitment 1. S. C. Holt 590.

33 H. 8. c. 12.

Northey, Attorney General, argued to the contrary: ss. That there was a standing commission of the peace for the *verge* and palace, and that the *officers of the Green Cloth* are always commissioners; that the statute 28 *H.* 8. did not create the privileges of this palace, but ascertained the boundaries thereof, for the queen may declare any house to be a royal palace, and this without any act of parliament; that such declaration is made under the great seal, after which it is a *palace*, though the queen doth not reside there; for the queen did not reside at the Tower, and yet *Burdett* had his hand cut off for murdering his keeper there, and was afterwards *executed*.

33 H. 8. c. 12.

Per Powell, Just. the privileges of the palaces are by common law, and in respect of the queen's presence; and he said, that the breaking into the Exchequer had been held *burglary*, though none of the queen's servants were there.

Ante 91.

But *Holt*, Ch. Justice, denied it; and as to *Burdett's* case, he said the same fact cannot be a misprision and a murder too, for the one will extinguish the other; it is true, his hand was cut off, but it was without any authority, for there was no judgment for it; he said, that he had searched the roll, which was *Mich.* 15 & 16 *Eliz. Rot.* 2. *Burdett* and *Muskett's* case, and there was no judgment for cutting off his hand.

See Stow. Chr.

Ante 92.

He held, that where there was a total absence, as in the principal case where the queen was neither present in person nor by her domestics, or any of her family, the place was not privileged; otherwise where there was only a short and personal absence: The queen now resides at *Windsor*, and suppose a murder should be committed in *Whitehall*, shall that be tried before the lord high steward, *&c.?* certainly not.

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13. BROWN v. BURLACE.

[9 Will. 3. B. R.]

Antea, Arrest 1. 45. S. C.

THE defendant was arrested in the *Temple*, and upon a motion to set it aside, it was insisted for him, that the Temple is * privileged from arrests by the king's grant.

* Dugdale 317, 320. Stow. Chron.

But *per Holt*, Chief Justice, if the king hath made any such grant, it is void in law, they having no court of justice within themselves there; it is true, the *Temple is extra-parochial*, and not within any parish, nor within the city, so as to come within the customs of the city, but it is within the county of the city, but the *Whitefriars* is within the jurisdiction of the city.

Yet the court inclined not to countenance arrests in the *Temple*, especially in *term time*, but would not set aside this arrest, so the defendant was held to special bail.

14. RUTH *v.* WEDDALL.

DEBT upon bond in *B. R.* brought against an attorney of the *C. B.*, the defendant pleaded, that he is an attorney of *C. B.*, and that there is a custom in that court, that an attorney shall not be compelled to answer, unless *per billam*, and so pleads his privilege to be sued *per billam*, and not by original; the plaintiff replied, that for five years past, before the original filed, the defendant had no clients, but had withdrawn himself from the practice and office of an attorney; and upon a demurrer to this replication, first it was objected, that the plea was ill, because the defendant had not set forth, that he had any clients, or that he prosecuted or defended any suits, that being the reason why an attorney should have privilege: *Sed per Curiam*, As long as an attorney is so upon record, he shall have privilege; then it was objected, that this *custom* was alleged *in fieri*, for it was, that an attorney should not be compelled to answer, unless *per billam*, he should have gone on, *nec a tempore cujus contrarium memoria hominum non existit compelli consuevit*, and this would have been an allegation of an usage *in fact*, which is essential to make a custom, and therefore must be positively set forth and alleged in pleading; but adjudged, that the court may take notice of the privileges of attornies, therefore a custom in such cases need not be so strictly alleged.

Ante 11, 283. 3 Lutw. Privilege of attorney well pleaded.

2 Wilson 231, 232. contra.

Vide Richardson's Practice 402.

PROCESS. [286]

1. AT *common law*, where the king was plaintiff in any action, whether for debt or damages, he had execution against the defendant, both for body, lands, and goods, but by *magna charta*, *cap.* 9. he was not to take out execution against the *lands*, if the defendant had sufficient *goods* to answer the debt or damages.

2. But where a subject brought an action against another subject, either for a debt or damages, his execution was only against the goods and chattels of the defendant, either by *fieri facias* or by *levari facias*, he could not have

execution against his *lands*, till the statute of *Westm.* 2., by which *cum debitum recuperatum est* an *elegit* is given, and that was only for a *moiety;* and by the statutes 13 *Ed.* 1. *de mercatoribus*, by the 27 *Ed.* 3. and by the 23 *H.* 8. an *extent* was given, but no *capias* lay till the statute of *Marlbridge*, *cap.* 23. and *Westm.* 2. *cap.* 11. and 25 *Ed.* 3. *cap.* 17., by which process of *capias* is given in *accompt* and also *in debt*, whereas before those statutes the process was *summons*, *attachment*, and *distress* infinite.

3. The process of *capias* on a judgment in debt is not given by the express words of any statute, but arises by consequence of law (*i. e.*) the statute giving a *capias in mesne process*, a *capias* in consequence lies *on the judgment*, because it is a rule of the common law, that wherever a *capias* lies in process before judgment, it will lie in execution upon the judgment itself.

2 Cro. 450. 1 Rol. 879, 897.

4. But if there is a judgment in *C. B.* against *the bail*, upon a *scire facias* brought against them, no *capias* lies on such judgment; otherwise if the judgment was given against them in debt, for then it is within the statute.

Com. Execution, c. 9.

5. But where judgment is given, as in a *scire facias* upon a recognizance against the bail in *B. R.*, a *capias* will lie, for so has been the course of that court (*a*).

1 Roll. 898.

6. There was a judgment on a *scire facias against the bail*, and a writ of error brought in the *Exchequer Chamber*, pursuant to the statute 3 *Jac.;* adjudged, that in this case no *capias* lies against them, for this matter is not to be guided by the custom of the King's Bench, but by the common law, and the *bail* bound their *goods and lands* by the recognizance, and not their *persons*.

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(*a*) But not in *scire facias* on a recognizance in Chancery, or in any inferior court, whether held by charter or prescription. 1 *Roll.* 35, 45, 50, 897.

PROHIBITION.

1 Vent. 274. Het. 13. Carth. 33. 2 Lev. 103, 187.

1. PROHIBITIONS are granted either *pro defectu jurisdictionis*, or *pro defectu triationis;* as where a man libels in the spiritual court for 20*s.* due to him by *custom*, for burying in the church; the defendant pleaded there was no such custom; in this case a prohibition lies *pro defectu triationis*, for the spiritual courts cannot try a *custom*.

2. A prohibition was granted to *Wood-street Compter* for refusing to admit a plea to the *jurisdiction*, which was tendered on oath, and before imparlance (*a*).

1 Vent. 180. 2 Sid. 464. Ray. 189. 2 Roll. 498.

3. In a prohibition, and upon a motion for consultation, it was insisted, that it ought not to be granted without pleading or demurring to the prohibition, for if erroneously granted, the party could have no remedy, either by writ of error or otherwise; but it was answered, that anciently in *B. R.* there were no declarations or demurrers upon prohibitions, and therefore consultations were granted upon motions.

1 Salk. 136. 2 Salk. 504. 8 Mod. 28. 1 Chan. C. 28, 29.

4. In a prohibition to the spiritual court, upon a suggestion, that they intended to try the *boundaries of a parish;* the plaintiff declared and entitled himself by letters patents granted to such a corporation, who made a lease to him, *&c.;* the defendant demurred to the declaration, for not shewing the letters patents and the lease, by a *profert hic in cur'*. *Sed per Curiam*, No consultation shall be granted for want of pleading them, for they may be given in *evidence.*

1 Rol. Rep. 332. 2 Ro. 291, 312. Letters patents may be given in evidence. 2 Cro. 70. 3 Cro. 178, 228. Sid. 89, 90, 100.

5. Where it appears upon the face of the libel, that the matter is not within the jurisdiction of the court, nor proper for their sentence, a prohibition will be granted at any time (*b*), but if the plea of the defendant be matter of spiritual jurisdiction, and it is refused or over-ruled, no prohibition lies (*c*), for in such case the party must *appeal;* otherwise, if it is a matter of temporal cognizance, as a *modus*, or an agreement, *&c.*

1 Mod. 273. Where a prohibition may be granted at any time.

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(*a*) *Sedente curia*, 6 *Mod.* 146. 1 *T. R.* 552.
(*b*) 2 *Inst.* 602, 619. 2 *Roll.* 318. (*c*) 2 *Roll.* 319. 1 *Roll.* 319. *Salk.* 548. 2 *Burr.* 813. *Cowp.* 424.

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6. FREEMAN *v.* SHOTTER.

RULED, That where a thing incident in the spiritual court is of a *temporal nature*, they must try it in the same manner in that court, as it would have been tried at law, otherwise a *procedendo* [*prohibition*] will be granted; but if the matter incident is of a spiritual nature, or of spiritual cognizance, they may try it according to their own law; as for instance, if they require *two witnesses* to the proof of a revocation of a will, a *prohibition* will not be granted, because such proof is required at [*their*] law (*d*); but if they require two witnesses to prove a release, a prohibition will be granted (*e*).

How the spiritual court is to try a thing of temporal nature

(*d*) *Carth.* 142. 2 *Roll.* 414. 1 *Sho.* 158. 3 *Mod.* 286. (*e*) *Carth.* 143.

7. ANONYMOUS.

[Hill. 9 Will. 3.]

Where an inferior court hath no original jurisdiction, prohibition will not lie after sentence. 1 Ventr. 88, 181. 2 Mod. 273. 1 Mod. 63, 91. 1 Salk. 201.

PER Holt, Ch. Just. Where an action is commenced in an *inferior court* of law, which hath no jurisdiction of the cause, in such case a prohibition will not lie after *sentence; but it is otherwise, if their suit is commenced in the *Admiralty*, or in the *spiritual court*, for their law is different from ours.

*Sid. 166. contra.

8. ANONYMOUS.

[Hill. 13 Will. 3.]

Prohibition to the spiritual court for words. Vide Lut. 1038. 2 Roll. 296. 1 Sid. 248. 2 Salk. 692. 2 Lev. 66.

LIBEL in the spiritual court by the husband and wife, for calling the husband *cuckold:* Ruled *per Holt*, Ch. Just., that a prohibition shall go, because they cannot *both sue* in that court for that word.

9. BROWN *v.* TANNER.

[Pasch. 2 Annæ.]

Prohibition for calling the parson drunkard.

†Cro. Car. 207. March 6. S. P.

‡2 Roll. 296. Jon. 441, 305. Godb. 417. Lut. 1054.

LIBEL in the spiritual court, for *brawling in the church-yard*, and for telling the parson, *thou art a pitiful drunken parson, and a drunken puppy;* and *Salkeld* moved for a prohibition upon the authority of the case between †*Star and Bucknell*, where for the like words a prohibition was granted, and so in ‡*Haine's* case; and the reason was, because *drunkenness* is a *temporal offence;* it is true, the cases before mentioned were of drunkenness in *lay-men*, but if it is an offence in a *lay-man*, *a fortiori* it should be so in a *clergyman;* it is a crime which doth not take its nature from the person who commits it, but from the law which is offended;

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‖Cousins's Apology.

‖it is true, the canonists make every thing which is a sin, and forbidden by the *Ten Commandments*, to be a spiritual offence, as *læsa fides*, *murder*, *perjury*, *&c.* But by the common law, whatever is taken notice of and punishable by the *temporal laws*, is a *temporal offence;* and what is not punishable by the temporal law, but by the spiritual law, in such case, that law is a kind of supplanting the temporal law, and the offences so punishable are spiritual offences, as *fornication*, *adultery*, *&c.*

Now as for *drunkenness* it was always accounted a *temporal offence*, for it was indictable at common law; and

alehouses were formerly appointed in the *leet*, and before the * 24 of *Eliz.* there was scarce such a crime in *England:* It is true, a *parson* may be deprived for *drunkenness*, and so he may for † *buggery*, but yet he is not punishable for that offence in the spiritual court, because it is a temporal offence; afterwards a prohibition was granted as to the words, but not as to the *brawling* in the church-yard.

* Camden Eliz. 263.

† Hob. 121, 290.

2 Roll. Higgins's case 296, and 12 Rep. 42. Fuller's case.

10. ANONYMOUS.

The ancient course of proceedings on a prohibition. Plow. Com. 72. Reg. 71.

PER Ch. Just. In the cases of prohibitions where they were granted upon a motion, the ancient course was, that the party prohibited sued out a *scire facias, quare consultatio non debet concedi post prohibitionem*, in which writ the suggestion was recited, and also a prohibition granted thereon, *ad damnum* of the party.

Afterwards this practice was altered, and the course came to be thus, (*viz.*) upon granting a prohibition to the plaintiff, the Court bound him in a recognizance to prosecute an *attachment of contempt* against the defendant, for suing in the spiritual court after a prohibition granted, and then to declare upon the *prohibition:* so that he who was the defendant in that court, is now become actor or plaintiff in the court above.

11. THE QUEEN *v.* RIDE.

[Mich. 5 Annæ, B. R.]

A POPISH recusant convict made his wife executrix, the spiritual court admitted her to proceed in proving the will, but a prohibition was granted, for she is disabled by the general clause of the ‡ *statute of Eliz.*, [3 *Jac.* 1. *c.* 5. *s.* 22.] and not enabled by the *proviso*.

Ante 133.

‡ Cap. 4. par. 22.

PROPERTY. [290]

See Trespass. Replevin, 4.

1. SUTTON *v.* MOODY.

[1 Ld. Raym. 250. S.C. Comyns 34. S. C.]

IN this case it was held *per Holt*, Ch. Just. That if the plaintiff declared in *trespass* for breaking *his close* and killing *centum cuniculos*, [*in the said close*,] it is good without say-

3 Mod. 97. 5 Mod. 375. 2 Salk. 556 S.C. 1 Cro. 553, 545. Jones 440.

March 48, 49. Of the different sorts of property.

ing *suos*, for he has a property in them in respect of his *close* where they were killed; and of things of this nature there are three kinds of property, (*viz.*) *absolute*, *qualified*, and *possessory*. (1.) A man hath an *absolute property in feris natura sua mansuetis*. (2.) He hath a *qualified property in feris mansuetis;* and (3.) He hath a *possessory property in feris:* Now whoever hath a *possessory property*, which is also a property *ratione privilegii*, there he may declare for the thing killed or taken, without saying that it was * *suum;* for he had a property by reason of his close in which it was, and may recover damages, which he cannot do unless the thing was *suum*. He farther held, that if a man finds a *hare* in his own land, and in hunting kills it on the land of another, it is the property of the hunter, and not of the person on whose ground it was killed; so if he *starts* a hare not on his own but on another man's land, and hunts it into the land of a third person, and there kills it, the property is still in the hunter; but if he starts a hare in a forest, and hunts and kills it in another man's land, the property is in the owner of the forest.

* 7 Rep. 17. b. 6 Mod. 183.

Cumber 464, 458. Ante 189.

March 48. 2 Salk. 556.

2. EVANS *v.* MARTELL.

[Mich. 9 Will. 3. B. R. 1 Ld. Raym. 271. S. C. 12 Mod. 156.]

Where the consignment of goods to another vests a property.

ONE *Harvey* loaded goods on board a ship, and *consigned them to Evans;* but by the *invoice* the goods appeared to be the property of *Harvey*, and now in an action brought by *Evans* against the defendant *Martell* for these goods, it was adjudged, that the *invoice* signifies little in this case, but that it was the *consignment* of the goods, which gave the property, and vested it in *Evans*, and therefore he might maintain this action; but if they had been *consigned* to him *upon the account of Harvey*, that would have altered the case, for then he would have been only *factor to Harvey*, and he must have brought the action, because the property was then in him.

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3. GIBBS *v.* WOOLLISCOTT.

[Trin. 7 Will. 3. B. R. Rot. 301.]

Skin. 677. Trespass for taking fish, and did not say suos, not good. Ante 290. * Indictment 14. 3 Mod. 97. Postea 4. Cumb. 11, 458, 465.

TRESPASS, *&c.* for that the defendant *in seperali piscaria, & in libera piscaria sua apud D. piscavit*, and did take and carry away * 500 *salmons;* upon not guilty pleaded, the defendant was found guilty as to the *fishing* in the *free* fishery of the plaintiff; and as to the *several fishery*, the jury found that the *locus in quo*, *&c.* was parcel of his manor.

Et per Holt, Ch. Just. A man may have a *free fishery* in his *own soil*, as for instance, he may have a river in his manor, and another may have a right of fishing there with him: But because the plaintiff in his declaration had not alleged, that the defendant took *salmones suos* (a), nor *ibidem cepit*, therefore the defendant had judgment.

(a) *Vide* 3 *Lev.* 227. *Jon.* 440. *Cro. Car.* 553. *Com. Pleader*, 3. *M.* 9.

4. THE QUEEN *v.* STEER.

THE defendant was indicted, for that at such a time and place, he *illicite* fished with nets in the *pond of T. S.*, and so many carps, *de bonis & catallis* of the said *T. S.* did take and carry away; it was objected against this indictment that *fish in a pond* could not be called *bona & catalla* of any particular person: *Sed per Curiam*, in a * *close pond* the fish may be called * *pisces suos*, because they cannot swim away, and therefore the owner of such pond hath a property in them *ratione loci;* but yet they cannot properly be called *bona & catalla*, unless they are in trunks, and for that reason this indictment was held ill, but the Court would not quash it upon a motion, but ordered the defendant either to plead to it or to demur.

6 Mod. 183. Fish in a pond may be called suos.

* 3 Mod. 97. contra. Vide Jones 440. March. 48. That they may be called pisces suos.

5. MALLOCK *v.* EASTLEY.

TRESPASS for taking two does *ipsius querentis* in a *close called the Park* (b); the defendant demurred generally, for that the plaintiff set forth in his declaration, that they were *his does*, when by law no man can have a property in deer, unless they are tame or reclaimed, though they are in a *park;* but in the principal case it did not appear, that they were in a park, but in a close called the park; and for this reason the defendant had judgment.

3 Lev. 227. Trespass for taking two does ipsius querentis. Vide 2 Cro. 195. Cro. Car. 553. 7 Co. 17. 3 Lev. 227.

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(b) It does not appear that the park was the plaintiff's *close.*

PURCHASE.

1. THE word *heirs* or *issue*, when used to denote a *single person*, or so as to be only *designatio personæ*, are words of purchase only, but when *collective*, they are words of *limitation.*

Where the word heirs is a name of purchase, and where a word of limitation. Vide Fearne's Contingent Remainders.

Where the word heirs is designatio personæ.

2. Whenever those words *heirs or issue* have words of *limitation* annexed to them, they are used only as *designatio personæ*, as where a devise is to *W. R.* for life, remainder to his heirs, and to the heirs females of their bodies.

Where a remainder to a man and his heirs is conveyed by way of use.

3. If a man make a lease for life, remainder to his heirs, or remainder to himself and his heirs, or to himself and the heirs of his body, the remainder is void, and his estate is not altered; but it is otherwise if he convey it by way *of use* with such *limitations*.

1 Mod. 159. 1 Vent. 378. Remainder to heirs males of his body is an estate tail executed.

4. And if he make a feoffment to the use of himself for life, remainder to the *heirs males of his body*, this is an entail executed in him, and so it is, if he *covenanted to stand seised* in the same manner.

Where the heir is in by purchase. Vide 1 Salk. 241.

5. Where the father devises to his *eldest son on condition*, in such case the son shall be in by purchase, and not by descent.

1 Mod. 226. Where an estate is vested by way of purchase, it shall afterwards go in a course of descent.

6. The case was, the father having two sons, in consideration of the marriage of his eldest son, covenanted to stand seised to the use of his said eldest son, and the *heirs males of his body*, [*remainder to the heirs males of the covenantor,*] remainder to the right heirs of the father; the eldest son married, and had issue *Edward and four daughters*, then the eldest son died, and afterwards *Edward* the grandson died without issue; and the question was, who had the best title, either the second son or the daughters of his elder brother; and adjudged, that the limitation to the eldest son, and to the heirs males of his body, is good; and that the estate vested in him by way of *purchase*, though at common law a man could not make his own right heir take by purchase, without departing with the whole fee-simple, but now by way of use he may; and in this case, after the death of the grandfather, both the estates-tail were vested in *Edward* the grandson, (*viz.*) As heir-male of the body of his grandfather, and father; and if so, then this being a remainder vested in him as a purchaser, the estate shall go on in a course of descent (*a*), and his sisters shall have it.

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Co. Lit. 27. a.

(*a*) *Viz.* to the heirs males of the body of the father. 1 *Mod.* 357.

QUARE IMPEDIT.

This is a possessory action, and how to declare in it. Vau. 17, 57.

1. THIS is a possessory action, and therefore not to be maintained without a possession, for which reason the plaintiff must always declare upon a *presentation* made by himself or his *ancestor*, or one whose estate he

hath, or by the grantee of the next avoidance, or by his lessee for life, or for years.

2. In a *quare impedit* against the *bishop*, and against *A.* and *B.* the patron and clerk, in which the plaintiff declared, that *W. R.* was seised of a *manor* to which the *advowson was appendant*, and presented *S.*, and that by *escheat* the said *manor* and *advowson* came to the king, and that he granted them to the plaintiff; and that *S.* the incumbent being dead, it belonged to him (the plaintiff) to present; the *bishop* confesses all the declaration, only says, that the *king was seised and presented B.* and *traversed, that he granted the manor and advowson to the plaintiff; B.* the incumbent pleads, that he is *persona impersonata ex presentatione domini regis*, and makes title in the king; the plaintiff replies that *B.* was not presented by the king, *&c.*, upon which *B.* demurs; and *per Curiam*, the bishop's plea is not good (*a*), for he can never *counterplead the title of the plaintiff* without making a title in himself, either as *patron or by lapse*, for otherwise he hath no interest, but only institution; and the plea of the *incumbent* is likewise ill, for by the common law he could not maintain the *title of his patron;* and if the patron was not made defendant with him, then he (the incumbent) might plead it in abatement; if he was made defendant, then he was to plead his own title, which was sometimes found to be inconvenient, because he would plead by covin; therefore by the statute 25 *Ed.* 3. the incumbent is allowed to plead the title of his patron; but in the principal case, if he was presented by *A.* he cannot quit the title of that patron, and plead a presentation and title by another person.

Elvis v. The Archb. of York and others, Hob. 315. Jones 5. Where the ordinary cannot counterplead the plaintiff's title, without making a title in himself.

For he can only plead, That he claims nothing but institution and induction. Jon. 6.

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Compl. Incumb. 512, 513.

3. The *very judgment* in a *quare impedit* is an amotion of the incumbent, though he continue still the possession *de facto*, and if the plaintiff be instituted upon a writ to the bishop, the defendant cannot appeal; if he doth, a prohibition lies, because in this case the bishop acts as the king's minister and not as a judge.

1 Roll. Rep. 62. 3 Leon. 138. Sav. 89. Hut. 24.

(*a*) The decision upon this point was the other way.

QUOD CUM. See Forgery, 1. Indictment, 6.

RECORD. See Statute, 5.

1. CROCKMERE *v.* WICKINS.

[Hill. 8 Will. 3. B. R.]

Where nul tiel record is pleaded, the party cannot demur to it. 2 Wilson 113. Vide 1 Ld. Raym. 347. Salk. 566. 1 T. R. 149. Str. 823. Carth. 517.

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AN action was brought in *B. R.;* the defendant pleaded another action depending between them *in the same* court, and for the same cause; the plaintiff replied, *nul tiel record, &c.* Adjudged, that in this case the defendant may pray *oyer* of the *record*, and the court may order that it may be inspected, and upon such *oyer* craved, an entry shall be made for the court to examine the record, and judgment shall be given upon failure of the record; the defendant (*a*) may likewise plead *nul tiel record*, and then also the entry and proceedings shall be as before mentioned; but he cannot rejoin properly *quod habetur aliquod tale recordum;* neither can he demur, for the record is perfect, and the pleading is at an end; and therefore a demurrer in this case was upon a motion ruled to be irregular, and set aside.

Where habetur aliquod tale recordum is a good plea. Postea 3. S. P. Dyer 180. a. 228.

2. But if the action had been pleaded as depending *in another court*, *pro eadem causa*, and the plaintiff replied *nul tiel record*, the defendant must have rejoined *quod habetur aliquod tale recordum.*

(*a*) This must mean the plaintiff, if it has any relation to the former part of the sentence.

3. HAMBLETON *v.* LANCASHIRE.

[Trin. 2 Annæ, B. R.]

Of pleading nul tiel record. 2 Salk. 566. Lut. 1514.

A *SCIRE facias* was brought against the *bail* in *B. R.* upon a *recognizance* in that court; the defendant pleaded in abatement another *scire facias* depending in the same court, and upon the same judgment: The plaintiff replied, *nul tiel record, & hoc paratus est verificare prout curia consideravit,* upon which there was this entry, *et quia curia dominæ reginæ nunc hic coram ipsa domina regina advisare vult super inspectionem & examinationem recordi per prædict'* the parties *allegat' priusquam judicium suum inde reddant, dies inde datus est partibus prædict' coram ipsa domina regina, &c. Usque ad, &c. de judicio inde de & super præmissis reddendo, &c.* upon which there being a *default at the day,* judgment

was given against the defendant: And now Mr. *Broderick* moved, that this was irregular, and that the plaintiff ought to have staid for a rejoinder; and he argued, that this was contrary to all the *precedents, and he cited all those in the *margin*. But on the other side *Montague* argued, that the judgment was well given; and to prove it he cited *Dyer* 228. and †*Buck's case* in *B. R.* which he said was a case in point.

*Coke Entr. 160. Rast. 334, 335. Robinson 214. Hern. 238. Vidian 48. Thomps. 280. †Mich. 8. Will. 3. Rot. 455.

Per Holt, Ch. Just. Where the record pleaded is in the same court in which the action is brought, there *nul tiel record* is not so proper as to crave *oyer* of the record (a), and that not a day to come, but *instanter*; but if the plaintiff replies *nul tiel record*, it is a traverse of the defendant's plea, and such an entry (as in this case) is the proper course, and more to the defendant's advantage than craving *oyer*, because he has a day given him to bring in the record, and there can be no trial in this case, as where the record is in another court, and for that reason it is improper to rejoin ‡ *quod habetur aliquod tale recordum*, as it ought where the record is in another court; for in such case *B. R.* awards a *certiorari* to that court, and the issue is tried by their certificate, but we cannot award a *certiorari* to ourselves; for it would be absurd to certify ourselves. [296] *Powell*, Just., at first was of a contrary opinion, that this judgment was not well given, because the plaintiff had *averred* his replication, which averment ought to have been answered by the defendant, for otherwise the record is not closed and perfected; but it being moved again upon another day, he came over to the opinion of the Chief Justice.

‡ Antea 3.

4. Adjudged, that where a pleader mis-recites a private act of parliament, the adverse party cannot demur, but must plead *nul tiel record*; for upon a demurrer it must be taken to be as pleaded.

Sid. 356. Where a record is mis-recited, the other side must not demur.

5. In an action of debt brought upon a judgment in an inferior court, if the defendant pleads *nul tiel record*, they shall certify only *tenorem recordi*; and the *Lord Chief Justice Hale* said, that he had seen *certiorari's* which only certify *tenorem recordi*.

1 Vent. 212. Inferior courts certify tenorem recordi. 1 Rol. 753.

(a) Mr. *Bayley*, in a note to the case of *Theobald* v. *Long*, 1 Ld. Raym. 347., 4th edition, observes, on a similar doctrine, that if, by "praying oyer," is meant, "demanding a note of the roll on which the other action is entered," the case may be law; otherwise it cannot, because the party is not entitled to oyer of a record. *Vide Ford* v. *Barnham*, *Barnes*, 4to edition, 340. *Doug.* 215, 459. 1 Term Rep. 159.

RECOVERY COMMON.

1. KING *v.* MELLING.

2 Lev. 58. Raym. 425. 1 Vent. 214, 225. Where a devise to B. and the issue of his body makes an estate-tail, and where such an estate is barred by common recovery.

THIS case is reported in several books, (*viz.*) The father devised his lands to his son *B. for life*, and after his decease, *to the issue of his body*, *&c.* and for *want of such issue* remainder over. *B.* suffered a *common recovery*, and the question was, what estate *B.* had. Two judges held, that he had only an *estate for life*, because such an estate was expressly devised to him. But *Hale*, Ch. Just., held, that he had an *estate-tail by implication*, and by consequence the recovery well suffered, for the words *issue of his body* is *nomen collectivum*, and the words which follow, (*viz.*) for *want of such issue*, make an *estate-tail by implication;* but judgment being given according to the opinion of those two judges, it was afterwards reversed in the *Exchequer-Chamber*, according to the opinion of the Chief Justice; and there it was held, that where an estate tail is barred by a recovery, all things depending upon it, as remainders, and all things derived out of it, such as rents, *&c.* are barred as well the estate itself, but nothing which is *collateral.*

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Vide 1 P. Wms. 777. 1 Inst. 237. Cruise on Fines, 108. acc. Recoveries 133.

Therefore a recovery will not bar the right of a *mortgage*, unless he is vouched, so likewise of an *executory devise;* but it will bar a *contingent remainder.*

2. So where tenant for life, with a *power* to make a jointure on his wife, suffers a common recovery, his *power* is extinguished; but it is otherwise where a power is collateral; as for instance, where an executor has power to sell.

2 Lut. 1225.

3. One seised in fee of lands, granted a rent *de novo* to *A.* in tail, remainder to *B.* in fee; *A.* suffered a common recovery; adjudged, that the estate-tail was barred, and that the recoveror had a fee-simple, which shall not determine, though *A.* die without issue.

4. But if the *tertenant* grants a rent *de novo* to *A.* in tail, who suffers a common recovery, in this case likewise the recoveror hath a fee-simple, but it is determinable upon the death of *A.* without issue; for the rent was not perpetual in its nature, and in such case the grantee shall not prejudice the tertenant.

RECUSANT. See Prohibition.

RELEASE.

1. LACY v. KINNASTON.

[Trin. 13 Will. 3. B. R. 1 Ld. Raym. 688. S. C.]

* 2 Salk. 575. S. C. A release of all his right will not release a judgment not executed.

THIS case is reported in * 2 *Salk.* by the name of *Clayton* v. *Kinnaston;* and in the * same book by the name of *Lacy* v. *Kinnastone*, but I do not find it stated any where, but only that it was held *per Holt*, Ch. Just., That a *perpetual covenant*, as he calls it, (*viz.*) never to take any advantage of a deed or covenant, is a release or defeasance of that deed or covenant; as for instance, where *W. R.* enters into an obligation to *H. S.*, who *covenants* never to take any advantage or to sue *W. R.* upon that bond; if afterwards an action of debt should be brought upon it, in such case *W. R.*, the obligor, may plead this covenant in bar to the action, and this to avoid circuity of action, for the obligee by this covenant hath deprived himself of all the remedy he can have upon this bond; but if *W. R. and R. W.* are *jointly and severally bound in a bond to H. S.*, who *covenants never to sue W. R. upon that bond*, this is no release or defeasance of the bond, neither can it be pleaded in bar if an action should be brought on it, because it doth not discharge the right, but only the remedy against *W. R.*, for he still hath a right of action against *R. W.*, the other obligor; therefore, if he (the obligee) should bring an action of debt upon this bond against *W. R.*, he is put to his action of covenant against the obligee, which would not lie if this covenant was a release, because a release to one obligee is a release to both. And *per Holt*, Chief Justice, A release of all his right in such lands will not discharge a judgment not executed, because such judgment doth not give or vest any right, but only makes it obnoxious, and liable to execution.

1 Lev. 43.

2. An acquittance in law ought to be a deed sealed, but the common practice is otherwise; an acquittance for rent due at *Michaelmas* last, is a good discharge of all former arrears; but it is otherwise in an avowry.

REMAINDER.

1. A *CONTINGENT remainder* cannot depend upon an estate *for years*, because it would make an *abeyance* of the freehold, which the law will never endure.

2. Neither can it depend upon an *estate in fee*, because after such a disposal the owner hath no estate left to him.

3. But it may depend upon an *estate for life*, or upon an *estate-tail*, because those are but particular estates, and a * bare right of entry will preserve it.

* 2 Lev. 35.

Harrison v. Belsey, Raym. 413. 1 Vent. 345. Jones 136. Fearne's C. R. 497. (259.) Poll. 582.

4. The case was, *T. P.* and *W. H.* were *jointenants for life*, remainder to the first son of *T. P.*, *&c.*; remainder to the right heirs of *T. P.*; afterwards the other jointenant for life released to *T. P.*; the question was, Whether the contingent remainder to the first son of *T. P.* was destroyed by the descent of the inheritance to him as heir at law to *T. P.*, and adjudged that it was; because, by the release of the jointenant for life to the other, (*viz.*) to *T. P.*, the fee was executed in *T. P.* the releasee; and there was no *particular estate* left in that jointenant to support this remainder.

1 Show. 92. acc. and that the first judgment was reversed.

Purefoy v. Rogers, 2 Saund. 385. 2 Lev. 39. 4 Mod. 384. Fearne 466. (242.)

5. The husband being seised in fee, devised to his wife for life, remainder to her first son, remainder to his own right heirs; the husband died and the widow married again; and she and her husband, before a son was born, levied a fine to one *Weston* in fee; the heir at law of the testator, having before that time, by bargain and sale, and fine, conveyed the land to the said husband and wife: Adjudged, that the *contingent remainder to the son* was destroyed, because the reversion in fee being immediately, upon the death of the testator, in his heir at law; and that reversion being conveyed by him to the wife by bargain and sale, and fine, and she having the particular estate for life, that estate for life was merged in the conveyance of the inheritance to her and her husband; and by consequence, when the remainder came in being, there was nothing to support it; for it shall not be preserved by the possibility which the wife had to waive the estate conveyed to her by the bargain and sale, *&c.* after the death of her husband.

And fine, 2 Lev. 39.

6. THOMPSON v. LEECH.

[1 Ld. Raym. 313. S. C. Cases in Parl. 150. S. C.]

THIS case is reported afterwards, and in several books, *quod vide* in the *margin:* But *per Holt*, Ch. Just. Where there is a tenant for life, with a contingent remainder, and he (the tenant for life) makes a feoffment in fee upon condition, and the contingency happens before the condition is broken, in such case the contingency is for ever destroyed, because there must be a *particular estate* in being, or a present right of entry when the contingency happens.

3 Lev 284. 3 Mod. 296. 2 Salk. 577, 618. 2 Vent.

7. But if the tenant for life enters for breach of the condition before the contingency happens, then the contingency is revived and may vest.

8. Where there is tenant for life with a contingent remainder to *W. R.*, and then tenant for life is disseised, and after that a descent and five years is cast; now, in such case, the contingent remainder is gone, because there is nothing left to support it; for the right of entry is turned into a right of action.

2 Salk. 577. 32 Hen. 8. c. 33.

9. DODDINGTON v. KYME.

[1 Ld. Raym. 203. S. C. named Luddington v. Kime.]

ADJUDGED, That after a contingent mean remainder in fee is once limited, no estate after limited can be vested; but when a contingent mean remainder is not in fee, but only for life, or in tail, an estate after limited by subsequent words may be vested, as in *Lewis Bowles's* case.

1 Salk. 224. 3 Lev. 431.

But if lands are devised to *A.* for life, and if he hath issue a son, then to that son in fee; and if he hath no son, then to *B.* and his heirs; no estate shall vest in *B.*

Ante 128. 1 Lev. 11.

10. THOMSON v. LEECH.

[Hill. 9 Will. 3. B. R. 1 Ld. Raym. 313. S. C. Cases in Parl. 150. S. C.]

SIMON Leech being *tenant for life*, remainder in tail to his first son, remainder to *Sir Simon* in tail; surrendered to *Sir Simon*, and afterwards had issue a son; and it was found, that the father was *non compos* when he made this surrender.

2 Salk. 577, 618, 676. Carth. 435. Cumb. 438, 468. Where the acts of an idiot are void, and where voidable.

It was insisted, that this surrender was not void, but only voidable; for as to himself he cannot avoid it by entry or by pleading, or by the writ *dum non fuit compos*, which writ being to avoid his own alienations, supposes that he *demisit*, and so doth the writ *de idiota inquirend'*; and the law needs not prescribe methods to avoid his acts, if they are void in themselves.

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2 Salk. 427, 576, 675. Cumb. 468.

But it was answered and resolved *per Holt*, Ch. Just., That the deed of a person *non compos* is void; that if he grants a rent, and the grantee distrains for the arrears, he may bring trespass: that his *letter of attorney* or his *bond* are void: It is true, the books say generally, that his deeds or bonds are not void, but that must be understood, as that the obligor cannot plead *non est factum*, because it appears to be a deed fairly executed, but it is of no force because of this latent defect or incapacity, which the law requires should be pleaded, and put in issue specially, and so are all his acts *in pais*, except his *feoffments* and *livery and seisin*, and those are only voidable; the reason is, because of the respect the law gives to a feoffment upon the account of its solemnity in the transmutation of a freehold; and the writ *de non compos mentis*, which says *demisit*, that must be understood of a *feoffment* or a *fine*, those being the ancient and the only conveyances at that time: An *infant* runs paralleled with an *idiot* in all cases but this, (*viz.*) that an *idiot* is not admitted to disable or stultify himself: And lastly, his deeds are void, because the law hath appointed no act to be done for the avoiding them; therefore this deed of surrender being void, the particular estate for life was not determined by it, and by consequence the contingent remainder not destroyed.

Cas. Parl. 153, 159.

Carth. 435. Cumb. 468.

1 Ch. Rep. 112, 153. 3 Ch. 135. Where a lunatick is to be made a party, where not.

11. The attorney-general exhibited a bill in equity against the defendant, to make him accompt to a *lunatick*, and to avoid a bargain made by him, and this was held good, though the *lunatick* was no party; for though it is generally true that he ought to be made a party, yet not in this case, because it would be to stultify himself.

7 Chan. 219.

But where a bill is brought in nature of an information by the *attorney-general* in behalf of a *lunatick*, there he ought to be made a party, if it is not directly to stultify himself, as in the case of an *infant*, for he may recover his understanding, and then he is to have his estate at his own disposal.

RENT.

1. TREGARNE *v.* FLETCHER.

[Hill. 8 Will. 3. B. R. 1 Ld. Raym. 154. S. C.]

THIS case is reported in 2 *Salk.*, but quite different (*a*); *ss.* *In replevin*, the defendant avowed, for that a rent was granted to him issuing out of Black-acre, *inter alia*, *&c.*; and that the rent being in arrear he distrained in Black-acre *prædict'*; and upon a demurrer to this plea it was adjudged ill; for *per Holt*, Ch. Just., he ought to have set forth the grant itself, that the plaintiff might discern it, and have an opportunity to reply an *entry*, eviction, or *recovery*, to avoid the defendant's title; and the rather, because this was in the case of a rent-charge, for in an assise for such a rent all the tertenants must be named; besides, the rent is entire, and issues out of every parcel of the land charged therewith, so that those words *inter alia*, shew an uncertainty upon the face of the plea itself.

2 Salk. 676. By the name of *Tregarne v. Fletcher.* Where the pleading *inter alia* is not good. Antea, Pleas 1. S. P.

(*a*) The report in Ld. *Raym.* agrees with that in 2 *Salk.*, with the addition of the last point here stated. From both reports, it appears, that this statement is incorrect, in saying that the plea was *adjudged* ill on *demurrer*, for it came before the Court by writ of error, and was adjourned.

2. MARCKAR *v.* HARRIS.

[Mich. 4 Will. 3. B. R. S. C. ante 211.]

IN an action of debt for rent, the defendant pleaded, that the plaintiff *nil habuit in tenementis*, *&c.*; the plaintiff replied, that he was possessed of a lease in the tenements for forty years made to him by the *Lord Wootton*, who had power to demise the same; and upon a demurrer to this replication, it was adjudged good, without setting out the title, for *nil habuit in tenementis* is the issue, and the plaintiff might reply, *quod satis habuit in tenementis*, (*viz.*) *in fee*, or *in tail*, *&c.*; and evidence might be given at the trial of any other estate; for where the issue is *nil habuit in tenementis*, the particular estate alleged in the pleadings is only form.

1 Wilson 314. 2 Wilson 208. Where nil habuit in tenementis is a good plea to an action of debt for rent. See Postea, Replevin 1. See 3 Lev. 133. Aylett v. Williams and Lee. 2 Ventr. 252. 4 Mod. 78.

3. The lessor made a lease, (*viz.*) in consideration of the payment of the rent herein-after mentioned, he leased,

1 Roll. Rep. 80. 2 Roll. 449.

&c.; and afterwards in this lease the lessee *covenanted* with the lessor, his heirs and assigns, to pay 10*l.* yearly: Adjudged, this was a rent, and not a sum in gross; for as a contract is *actus contra actum*, so a covenant is *convenire*, which *ex vi termini* ought to be on both sides; therefore the word *covenant* must relate to both.

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2 Vent. 129. Where an action of debt is brought upon an entire contract, and where not. Ante 118.

4. In debt for rent the plaintiff declared on a lease at will dated 25th *March*, rendering 10*l.* rent by quarterly payments; and that he (the defendant) entered, and was possessed till *Christmas* following; and for 50*s.* for a quarter's rent, ending at *Christmas*, this action was brought: And upon a demurrer to the declaration, it was objected against the plaintiff, that he had sued for a quarter's rent due at *Christmas*, when *two quarters more were due*, (viz.) *Midsummer* and *Michaelmas rent;* and so the action was brought for less than was due, without shewing how the rest was discharged: *Sed per Curiam*, Every quarter's rent is a several debt, for which distinct actions may be brought; and so not like an action of debt for part of the money upon an entire contract.

1 Lev. 22. Raym. 11. Whether debt will lie where there is no privity of contract.

5. Lease to the defendant for twenty-one years, rendering rent; afterwards the lessor who had the fee granted the rent to the plaintiff, but not the reversion, and the grantee of this rent brought an action of debt for the rent arrear; the defendant pleaded *nil debit*, upon which they were at issue, and the plaintiff had a verdict; the Court was divided, Whether an action of debt would lie? Two judges of opinion that it did not, because there was no privity of contract between the grantee of the rent, and the lessee; two other judges of another opinion, because the rent was originally subject to an action of debt; and though it is now in another, (*viz.*) in the hands of the grantee, yet the law is still the same; besides, here is a privity of contract between them, because the lessee having attorned to the grantee of the rent, this attornment is *quasi* a new contract between them. See the case of *Ards* v. *Watkyns.*

Remedies by the statute 32 H. 8. cap. 7. See the case of Howell v. Bell.

6. If *tenant in fee* or *in tail* die, his executor may have an action of debt by the statute 32 *H.* 8. for the rent arrear, and due in the life-time of the testator; or he may distrain; but before this act the executor had no remedy at common law.

1 Cro. 471. Vide 1 Ld. Raym. 1006. St. 8 Ann. c. 14. s. 4.

7. So it was in the case of a *tenant pur auter vie*, for his executor had no remedy till the death of *cestui que vie;* but now he may distrain, or have an action of debt for the rent arrear.

Ante 136.

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8. *If *tenant for life* die, his executor might bring an action of debt for the rent arrear, and this was his remedy at common law; but a new remedy is given by this statute, and that is to distrain.

9. But if a grantee of a rent for twenty years, if he so long live, and there is rent in arrear, and then the grantee dies, his executor cannot distrain for the arrears within this statute, but must keep to his remedy at common law. Bull. N. P. 57.

10. If *tenant in fee* had made a lease for years, he or his executors might have an action of debt at common law for the rent arrear, but not if he had made a gift in tail, or lease for life; because, in such case, the rent is a *freehold;* and an action of debt being only a personal action, lies only for a chattel interest; but now an executor may bring debt within this statute; but this must be intended where the rent issues out of freehold, and not copyhold lands. Co. Lit. 162. Yelv. 138.

11. *Lessee for years* died intestate; his administrator made an underlease to *W. R.*, and died: Adjudged, That his executor or administrator may have an action of debt for the rent arrear upon the underlease, and not the administrator *de bonis non* of the lessee, though he hath the reversion, for he comes in by a collateral title paramount the lease. Vent. 259.

REPLEADER. See Default, 1. [305]

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1. WITTS *v.* POLEHAMPTON.

[Mich. 10 Will. 3. B. R.]

PER *Holt*, Ch. Just. Where the plea of the defendant confesses the duty for which the plaintiff declared, but doth not sufficiently avoid it, and thereupon issue is joined on an immaterial thing, if it is found for the plaintiff, he shall have judgment, though the *issue was immaterial;* but where the defendant's plea avoids the plaintiff's duty, who replies and traverses a matter not material, and issue is taken upon such *immaterial traverse, and it is found for him, the statute of *jeofails* will not help in such case; but there must be a repleader.

Vide 1 Salk. 173, 216, 579. Str. 394. Bur 292. Cowp. 510. 4 Bac. Abr. 126. Com. Pleader, R. 18. Difference where the issue is immaterial, and where it is taken upon an immaterial traverse. *Cro. Eliz. 24, 164. 5 Rep. Nicholl's case. 2 Cro. 5.

2. *Trover* against husband and wife, upon the conversion made by the wife to her own use, they pleaded, *quod ipsi non sunt culpabiles*, upon which they were at issue, and the plaintiff had a verdict; but a repleader was awarded, because the wrong done being alleged to be

Where the issue is immaterial. Cro. Jac. 5.

done by the wife, and none by the husband, the issue should have been *quod ipsa non est culpabilis.*

Repleader allowed after a verdict, but never after a demurrer. Latch. 147. Cumb. 323.

3. But though a *repleader* hath been allowed after a verdict, as in the case last mentioned, it was never yet allowed after a *demurrer;* so it was reported by Mr. *Latch*, but since his time it hath never been allowed; as for instance, 1 Leon. 79. 2 Lev. 142. Mod. Ca. 102. Saund. 89. 2 Bul. 37.

3 Lev. 440. Repleader allowed after a demurrer argued.

4. In a *quantum meruit* by a surgeon for curing a wound, the defendant pleaded a tender of two guineas value 45*s.*, which was sufficient, and traversed, that the plaintiff deserved more; and upon a demurrer to this plea, it was adjudged to be ill, because the *traverse made it double and impertinent;* besides no such value could be set on guineas, and a *repleader* was awarded, but without a *traverse*, and the plea was to be of a tender of 45*s.*, and issue to be taken of the sufficiency thereof: It is true, it hath been often denied, that any repleader should be after a *demurrer*, but only after *issue joined* (*a*); but here it was not only after a demurrer, but after that demurrer was argued.

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6 Mod. Cases 102. No repleader after a demurrer, nor a writ of error. 3 Lev. 440.

5. And yet since this last case it hath been ruled, that a *repleader* can never be awarded after a *demurrer*, nor after a writ of error, but only after issue joined.

(*a*) *Vide* authorities cited pl. 3.— This, and a case 3 *Lev.* 20., appear to be the only instances of repleader allowed after a demurrer. The modern practice is, to give the party pleading insufficiently, leave to amend, upon payment of costs.

REPLEVIN AND AVOWRY.

1. CHALLONER *v.* CLAYTON.

[Pasch. 10 Will. 3. S. C. cited in 1 Ld. Raym. 334. S. C. 12 Mod. 408.]

In replevin the defendant avowed and did not set forth any title, not good. See ante, Rent 2.

IN *replevin*, the defendant avowed for rent, setting forth, that he was *possessed* of a house for several years yet to come, and being so *possessed*, he demised it to the plaintiff for one year, rendering rent, *&c.*; the plaintiff replied, that the defendant *nihil habuit in tenementis;* the defendant rejoined *quod satis habuit, &c.*; and upon a demurrer

to this rejoinder, Mr. *Northey* moved to amend it, for that he could not make good his avowry, there being * no title set forth; it is true, in an action of debt for rent reserved upon a lease, the defendant may plead *nihil habuit in tenementis*, and the plaintiff in his replication may shew title, because *quod cum dimisit* is a sufficient allegation in a declaration: but in an avowry a *title* should be shewn, and therefore it is not proper in a rejoinder (*a*).

* See Freeman v. Jugg, postea 3.

(*a*) It is enacted, by *stat.* 11. *G.* 2. *ch.* 19., that defendants in replevin may avow generally, that "the plaintiff held under such an article, &c., at such certain rent, during the time that the rent so distrained for incurred, which rent still remains due," without setting out the grant, tenure, or title of such landlord. If the defendant avows under this statute, *nil hab. temen.* is an inadmissible plea. 2 *Wils.* 208.

2. BAKER *v.* LADE.

[Mich. 4 Will. 3. B. R.]

5 Mod. Where a deed must be pleaded as it operates by law.

IN *replevin*, the defendant avowed for a rent-charge, setting forth, that his father was seised in fee, and in consideration of 5 *s.* and natural affection *dedit & concessit* the reversion to him, that this *grant* was without any *attornment*, and that it did operate as a *covenant to stand seised*, *&c.*; and upon a demurrer, three Judges in the † Common Pleas held the plea to be good by the words *dedit & concessit*, because the Court will judge what the law is upon those words, (*viz.*) that it will amount to a *covenant to stand seised;* but *Pollexfen*, Ch. Just., held the plea to be ill, for that the defendant ought to have pleaded according to the operation of this deed by law, (*viz.*) that his father did covenant to stand seised, and not by the words *dedit & concessit;* and thereupon a writ of error was brought in *B. R.*, and according to the opinion of *Pollexfen*, the judgment was reversed, (*viz.*) that this deed should have been pleaded according to the operation of law.

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† 4 Mod. 149. 2 Vent. 140, 260 3 Lev. 291.

3. FREEMAN *v.* JUGG.

[Trin. 12 Will. 3. B. R.]

In avowries for damage-feasant the avowant must shew where the fee is, and how the particular estate is derived.

IN *replevin* for taking a *horse*, the defendant avowed, that *he was possessed* of the close, being the *locus in quo*, *&c.*, for a term of years yet to come, and being so possessed, the horse was damage-feasant there, *&c.;* the plaintiff replied, that the defendant was to keep up his *fences* round the said close, but that the same being down, and out of repair, the horse escaped into the close for want of good fences, upon which they were at issue, and at the trial the plaintiff was

nonsuit; and now it was moved in arrest of judgment, that this avowry was ill, because in all avowries for *damage-feasant*, the avowant must shew where *the* * *fee* is, and how the particular estate is derived, *quod fuit concessum per Curiam*, if there is a demurrer to such avowry; but because the plaintiff by his replication had waived that matter, and confessed and admitted a possession in the avowant, that is sufficient to justify a distress *damage-feasant*, and hath cured this defect in the avowry.

* See Challoner v. Cleyton. Antea 1. Carth. 445. 2 Salk. 562.

Vent. 249. In replevin, the defendant may plead property either in bar or abatement. 2 Lut. 1151.

4. *In replevin*, the general issue is *non cepit*, but the defendant may plead *property* in himself, and this he may do, either in bar or in abatement to the action; but if he plead property in a stranger, he must conclude *in abatement* (*a*); and it is to be observed, that upon the general issue, *property* cannot be given in evidence, therefore it must be pleaded there; as to the plaintiff in replevin, he must have a property either general or special, and his replevin must be either in *detinuit* or *detinet;* if in the first case, then the plaintiff hath his goods again, and the action is brought only for damages in the taking and detaining; if it is brought in the *detinet*, then it is where the goods are still detained from him.

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The declaration must be not only of a taking in a vill or town, but *in quodam loco vocat'*, *&c.*, otherwise it is naught upon a demurrer; but such a declaration in an action of trespass is good.

Litt. 37.

Replevin for taking *several of his beasts in quibusdam locis*, called *A.* and *B.;* upon a demurrer to this declaration, it was held ill, because the plaintiff ought to shew how many were taken in one place, and how many in another place.

Jones 414.

The defendant in replevin had no damages given at common law, but this is by the statute 7 and 21 *H.* 8.

(*a*) It may be pleaded in bar. 1 *Salk.* 94.

REQUEST.

Resolutions where a Special Request is to be made, and where "a General *Licet sæpius requisitus*, *&c.* is sufficient."

Vide Comyns Pleader, c. 69, 79. Condition L. 11. 5 T. R. 409.

1. IF I promise *B.* to deliver him two pipes of wine out of my cellar, to be chosen by him, in such case he must make the *request;* but if I promise *B.* to deliver to

C. two pipes of wine, to be chosen by *C.*, I must *request* him to choose them.

Allen 25. 1 Rol. 465, 452.

2. Where a man promiseth to pay a precedent duty, there *licet sæpius requisit'* is sufficient, because there was a duty without the promise, as if one buy or borrow my horse, and promiseth to pay so much upon request.

Noy 95. Latch. 93. 209. 3 Leon. 200. 3 Lev. 364. Skin. 347. Cro. El 73. 2 Cro. 183, 523. Cro. Car. 35. Str. 88.

3. But if the promise is *collateral*, as for instance, to pay the *debt of a stranger upon request*, there the *request* is part of the agreement, and traversable; for there was no duty before the promise made, and for that reason the *request must be specially alleged*, for the bringing the action will not be a sufficient request; * so likewise where there are mutual promises to pay each other 4 *l.* upon request, if they do not perform such an award, the request must be specially alleged.

Cro. El. 85. Lut 231. Sav. 72.

* 1 Saund. 35.

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4. But as to this matter, there is some difference in the action brought; for if I promise to redeliver upon request, such goods as were delivered to me, there if an *action of detinue* is brought, the plaintiff need not allege a *special request*, because there was a precedent duty as aforesaid, and the action is brought for the thing itself.

5. But if an *action on the case* is brought for these goods, then the request must be *specially* alleged; for it is not brought for the thing itself, but for damages.

Sid. 66.

6. Where a promise is made to *pay money to the plaintiff upon request*, there needs no special request; but if the promise was made to *A.* to pay *B.* so much money upon request, there must be a special request alleged; and so, if the promise was made to the plaintiff himself to do any collateral act upon request, as to purchase, *&c.*, there must be a *special request* alleged.

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7. FITZHUGH *v.* DENNINGTON.

[Mich. 3 Annæ. 2 Ld. Raym. 1094. S.C. 6 Mod. 227, 259. S.C.]

2 Salk. 585. Where a request is to do a collateral thing, it must be averred.

DEBT upon a bond conditioned at the *end of seven years*, to make the plaintiff free of the *Joiners'* Company, *if requested thereunto;* the defendant pleaded, that at *the end of seven years* he was not *requested;* and upon demurrer to this plea, the defendant had judgment, because the request being to do a *collateral thing*, and being part of the condition, ought to have been averred by the plaintiff, which he had not done: It is true, it was objected against the plea, that the defendant should have pleaded generally, that he was not requested, but he had pleaded, that he was not requested *at the end of seven years*, *&c.*, it

should have been *before the end of seven years*: But *per Curiam*, The condition was not to make the plaintiff free *post terminum* of seven years, but *ad terminum*, and the end of a thing is always part of that of which it is an end; so that he was to be made free on the last day of the seven years, and to make a request some time of that day, so that the defendant might have a reasonable time to procure it to be done.

Mod. Cases 200. Where there is a duty before a demand made, there licet sæpius requisitus is sufficient.

8. The defendant borrowed money for the use of his mother, and gave bond to pay it *on demand*, if his mother did not; and in an action of debt brought on this bond, the defendant, after *oyer*, demurred to the declaration, for that the plaintiff did not lay any special request, when and where he required the mother to pay it, and that the general allegation *licet sæpius requisitus* will not be sufficient, which is very true, where there is no duty till a demand made; but *per Curiam*, Here was a duty *ab initio*, which the law makes payable on demand, and in such case it is not necessary to allege an express demand (*a*).

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1 Vent. 71, 74. Where a special request need not be alleged. 1 Leon. 91. 2 Lev. 198. 7 Mod. 144.

9. *Case, &c.*, in which the plaintiff declared, that *T. S.* owed him 20*l.*, and that the defendant owed *T. S.* 20*l.*, and that in consideration the plaintiff, at the special instance and *request* of the defendant, would procure an order from *T. S.*, directed to the defendant, to pay the 20*l.* to the plaintiff; he, the defendant, promised to pay it, that accordingly, he (the plaintiff) did procure an order, *&c.* which he shewed to the defendant, and required him to pay the money, which he refused; and upon a demurrer to this declaration it was objected, that he did not allege that he procured this order at the request of the defendant; and since the promise was not made on a consideration of a duty to the plaintiff himself, but in consideration of a collateral duty which became due upon a special promise, therefore a request should be alleged to pay the money, and both the time and place set forth specially: *Sed per Curiam*, No other request is necessary than what is set forth in the agreement, (*viz.*) that the plaintiff, at the request of the defendant, did procure the order, and no subsequent request was intended.

(*a*) In this case the obligor was the original debtor. It seems to be otherwise if the obligor were not the original debtor, as in 6 *Mod.* 200.; and it had been payable on demand, or upon default of payment by another. 6 *Mod.* 200. - 2 *Vern.* 74.

RESCOUS.

1. ANONYMOUS.

[Mich. 8 Will. 3. C. B.]

1. *PER Treby*, Ch. Just. of *C. B.*, Upon an unlawful distress, the owner of the cattle may rescue them before impounding, but not after.

5 T. R. 432.

2. *Rescous* was returned to be done by the bailiff: *Et per Curiam*, It is good, whether he be bailiff of a *franchise*, or the sheriff's bailiff.

2 Lev. 28, 144. Vide 2 Roll. 426. Cro. Eliz. 781. Lutw. 130. March 1. 2 Show. 180.

*3. Case against sheriff upon an *escape* on *mesne process;* the defendant pleaded a *rescous*, and upon a demurrer to this plea, he had judgment, though he did not set forth that the rescous was returned.

3 Lev. 46.

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4. Where a bailiff hath a warrant to arrest a man, and is hindered in the execution of his office, this is *no rescous* unless there was an *actual arrest;* but it is a misdemeanor and contempt of that court out of which the process issues.

6 Mod. Cases, 210. F. N. B. 102.

5. Case against the defendant for a rescous upon *mesne process;* the evidence at the trial was, that the bailiff stood at the street-door, and sent his follower up three pair of stairs in a disguised habit, with the warrant, who laid hands on *W. R.*, and told him that he arrested him; but *W. R.*, with the help of some women, got from the follower and ran down stairs, and the defendant hearing a noise, run up and put the said *W. R.* into a room, then locked the door, and would not suffer the bailiff to enter. *Holt*, Ch. Just. doubted whether this was lawful a arrest, being by the bailiff's servant or follower, and not in the presence of the bailiff himself; but said, that the plaintiff must prove his cause of action against *W. R.*, and that he must prove the writ and warrant, by producing sworn copies of them, and he must prove the manner of the arrest, that it may appear to the Court to be a lawful arrest; and in point of damages, he must likewise prove the loss of his debt, (*viz.*) that *W. R.* became insolvent, or could not be re-taken.

Wilson v. Geary, 6 Mod. Cases 211. What is a rescous.

RESERVATION.

Vide Com. Rent, B. 5. 1 Vent. 161. Reservation what it is.

1. A *RESERVATION* is a kind of a return of something back in retribution of what passes away; and therefore whatever it is, it shall be carried over to him who should have succeeded to the estate, or to the thing demised, if no lease had been made; and therefore, where a man seised in fee makes a lease for years, reserving rent, this rent is descendable to the heir, as the land itself out of which it issues doth descend, because it comes in *lieu* of that which should have descended.

2 Saund. 367, 370. 1 Vent. 148, 161. Ray. 213. 2 Lev. 13. Cro. Eliz. 822. Cro. Car. 289. 5 Co. 111.

2. The *tenant in fee-simple* made a lease for years, reserving rent to *him and to his executors; per Curiam*, the rent shall not go to them, because it is not a *testamentary estate*, and therefore it shall determine with the life of the lessor.

3. So if the lessee for 100 *years*, make a lease for *forty years*, rendering rent to *him and his heirs*, this is void as to his *heirs*, and shall likewise determine with the life of the lessor (*a*).

Co. Lit. 47. a.

4. So likewise, if the rent is reserved to himself, without any other additional words, because the rent is a new creature, and cannot have a longer duration than its creation gave it.

2 Saund. 367, 370. 1 Mod. 217. Woodf. Inst. 186. 2 Lev. 13. 1 Vent. 148, 162, 163.

5. But if *tenant in fee* make a *lease for years*, reserving rent to *him and his assigns*, this shall go to his heirs.

Vide Cro. Eliz. 217. Owen 9.

6. If it is reserved to him and his assigns *durante termino, &c.*, or to him *durante termino*, or to him and his executors *durante termino;* in these cases those additional words shew that the rent should continue to be paid as long as the term is in being, and in such case it shall descend with the reversion to the *heir at law*, and the word *executor* is void, and the reservation shall be as if it had been to him only during the term.

1 Vent. 242, 272. Carth. 162. 1 T. R. 445.

7. *Lessee for years* surrendered to the lessor by *parol* (*b*), reserving a rent: Adjudged, that this was a good reservation upon the *contract*, and that an action of debt would lie for the rent after the first day of payment incurred, though the reservation was by way of contract, and without any deed.

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(*a*) It shall go to his executor. 1 *Ventr.* 162.

(*b*) No surrender can be without a note in writing. *27 Car. 2. c. 3.*

RESTITUTION.

1. THE KING v. HARRIS.

[Trin. 11 Will. 3. B. R. 1 Ld. Raym. 440, 482. Comyns 61. 12 Mod. 443. Holt 324. S. C.]

THE case was, *Harris* was ousted by a *vi laica amovendo*, and *Morgan* put into possession; afterwards *Harris* got the justices of the peace to inquire into the force, and accordingly, on the *20th of October* 1695, an inquisition was taken, by which it was found, that *Morgan* forcibly entered and detained the church, and about three years and two months after this inquisition was taken, (*viz.*) *in December* 1698, the justices awarded a precept to restore *Harris*, which was executed; and thereupon *Morgan* brought a *certiorari* to remove this inquisition into *B. R.*, and a writ of *restitution* was awarded, with this entry, *quia constat nobis super separalia sacramenta, quod restitutio superinde* was not made till three years after the *inquisition* taken, *&c.*; for the statute intended a speedy remedy for the possession, which was lost, without trying the right; and an execution so long after is not a *fresh pursuit*, and might be dangerous to purchasers; and it is in this case as in the case of a *conviction* of a forcible entry upon view, upon the statute *15 *Rich.* 2., where the commitment must be made presently.

5 Mod. 443. Where restitution was not made till three years after the inquisition, it is not good. 1 Salk. 260. Carth. 496. Sid. 201. 1 Lev. 90.

Woods. Inst. 429. 1 Hawk. 275, 303 8 Co. 120. Carth. 497. Brownl. 266. * 15 Rich. 2. cap.

2. The defendant's goods were seised, being imported contrary to the act of navigation; and afterwards the property was claimed by C. and others; and the question was, Whether the court ought to grant writs of restitution, *ex debito justitiæ*, upon giving security? and adjudged not, for it is discretionary in the court, and if granted it is *ex gratia.*

Hardr. 97. Where a writ of restitution is ex-gratia.

3. *At *common law* where goods were *feloniously* taken away, the owner had no remedy to recover them but by *appeal;* and therefore, if the party was indicted before the appeal brought, and either convicted or acquitted, the appeal was barred, and consequently the owner lost his goods for ever; for if convicted, they were forfeited to the king, and if acquitted, that was a good bar to the appeal; therefore in favour to the owner, and to give him a reasonable time to bring his *appeal*, the king seldom proceeded by way of *indictment* till a full year after the offence done. But then there was this inconvenience, that the king's evidence were either kept secret or died, and the party would bring an appeal; therefore by the statute 21 *H.* 8. *cap.* 11. the owner had the same advantage upon a conviction as he had upon the *appeal*, (*viz.*) that a writ of restitution should be awarded as well upon a conviction on an indictment, as on an appeal.

Formerly the king never proceeded on an indictment till a year after the offence, that the party might bring an appeal.

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RETURNS OF PROCESS.

Yelv. 34. Before the stat. of Ed. 2. the sheriff never put his name to a return.

1. BEFORE the statute of *Ed.* 2. the sheriff or other officer never put his name to the return, but now by that statute he must do it; and therefore, as at common law, the party might say, that the sheriff did not make the return, because his name was not indorsed, so he may still, though his name is indorsed, because the statute hath not taken away that averment, for the party may aver, that he who indorsed the writ is not sheriff.

Sid. 23. If he return cepi corpus, and hath not the body ready, he shall be amerced. Postea 4. S. P.

2. At *common law*, if the sheriff had made a false return, or no return at all, an action on the case would lie against him.

3. But if he return *cepi corpus*, and hath not the body ready at the day, he shall be amerced till he have him, or assign the bail-bond to the plaintiff, but no action lies against him in this case for a false return, because he is compellable to take bail. But if an action should be brought against him, he ought not to demur on the declaration, but to plead the statute by which he is compellable to take bail.

1 Vent. 55, 85.

1 Mod. 239. 2 Mod. 83. Where the sheriff returns a cepi corpus, and hath not the body ready, he shall be amerced. Antea 3. S. P.

4. **Case* against the sheriffs of *London* and *Middlesex*, for a *false return of a bill of Middlesex*, which was *cepi corpus* and *paratum habeo*, when in truth they had not the body at the day of the return of the writ; the defendants pleaded the statute 23 *H.* 6., that they took bail for the appearance of the prisoner, and so discharged him, and that at the day of the return of the writ, they returned *cepi corpus, &c.* The plaintiff replied *protestando*, that the defendants did not take sufficient bail, *&c.* and then pleaded, that they had not the body ready; and upon a demurrer to this replication it was insisted for the plaintiff, that though an action for an escape would not in this case lie against the sheriff, because he is enjoined by the statute to *take bail*, yet an action for this false return will lie: But *per Curiam*, at common law there was no other return than *cepi corpus*, or *non est inventus;* and that this statute makes no alteration of the *returns;* and by consequence no action lies against him for returning *cepi corpus*, and the words *paratum habeo* makes him liable to be amerced till he hath the body.

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REVOCATION.

1. COUNTESS OF BRIDGWATER v. DUKE OF BOLTON.

[2 Ld. Raym. 968. S. C.]

IN this case it was held by *Powis, Serjeant*, and admitted by Mr. *Cowper* on the other side, as often adjudged in Chancery (*a*), that where the testator is seised in fee, and by his last will *deviseth his lands to W. R. in fee*, and afterwards he *mortgages the same lands in fee to W. W.*, and then dies before the principal and interest is paid, that this *mortgage* doth not amount to a *total revocation* of the will, but only *quoad* so much, for which the lands were mortgaged, and that the devisee shall have the equity of redemption.

1 Salk. 158. S.C. Where a man mortgages his lands after he hath devised them by will, it is only a revocation, quoad so much as is mortgaged.

2. * The testator made a will of lands, and afterwards he made another will, but it did not appear that any lands were devised by this *subsequent will;* and this matter being found in a special verdict, *Hale*, Ch. Just. held, that a second will substantive, and independent of the first, is a revocation thereof, whether it is consistent or not; but if it be depending on the first will, or relative to it, it is not a revocation so far as it is consistent, because it may be in confirmation of the first will; and this might be so in the principal case, for any thing appears to the contrary.

Hard. 375. Where a subsequent will shall not revoke a former. Vide Cowp. 49.

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3. A settlement was made, and therein a *power* was reserved to *revoke*, by indenture sealed in the presence of *three witnesses;* afterwards, the party, without taking notice of his power, covenanted by indenture to levy a fine to other uses, which indenture was sealed in the presence of *three witnesses*, and afterwards a fine was levied accordingly; the question was, Whether this was a revocation of the first settlement? *Et per Curiam*, The covenant alone will not do it, because it raises no uses, nor passes any estate; and the fine alone will not do it, because it is no indenture in the strict acceptation of the word; but both together make a good conveyance, and by consequence a good revocation.

Where a fine and deed make a revocation, when one will not do it.

2 Lev. 149. 1 Ventr. 279. Ray. 239. Carth. 25.

But if the fine had been levied first, it would have extinguished the power.

1 Ventr. 280, 291, 368, 371. 2 Lev. 149.

4. Where a feoffment is made to uses, with a power to revoke and limit new uses, there the feoffor may revoke and limit *in infinitum;* but where the power is only to revoke, there, when that power is executed, he cannot limit new uses.

1 Vent. 197, 355. 1 Sid. 344. 1 Ch. Rep. 241. contra 4 Ch. 46. 1 Mod. 40.

(*a*) *Vide* 1 *Salk.* 158. *ac.*

RIOT.

1. ANONYMOUS.

[Pasch. 1 Will. 3. B. R.]

PER Holt, Ch. Just. An indictment against *W. R.*, for that he *cum multis aliis*, at *H.*, *&c.*, did commit a riot, is good.

Where the sheriff must be a party to an inquisition for a riot; where not. 2 Salk. 593. K. v. Ingram, Ld. Raym. 215. Ray. 386. Carth. 383.

2. Adjudged, that where rioters are convicted upon *view of two justices*, the sheriff must be a party to the inquisition, upon the statute 13 *H.* 4.; but if they disperse themselves before conviction, the sheriff need not be a party, for in such case the two justices may make the inquisition without him, and this is *pro domino rege;* but if the justices neglect to make an inquisition *within a month after the riot*, they are punishable; but the lapse of the month doth not determine that authority to make an inquisition, but only subjects them to a penalty for not doing it within that time.

Raym. 386. Lamb. 319. Dalt. ch. 46. 1 Hawk. ch. 65. s. 27. 13 H. 4. cap. 7.

3. One *Tempest* and two more were convicted for a riot, upon *view of two justices*, and of the sheriff of the county, *contra formam statuti*, and they were *fined by the two justices;* and upon a writ of error brought, the error assigned was, that the *sheriff* did not join with the justices in setting the *fine*, when the statute expressly requires, that he should be joined with the justice in the whole proceedings; and for this cause the judgment was reversed.

6 Mod. Cases, 212.

4. Several were indicted for a riot; it was moved, that the prosecutor might name two or three, and try it against them, and that the rest might enter into a rule to plead not guilty, [*guilty if the others were found guilty*,] and a rule was made accordingly, this being to prevent the charges in putting them all to plead.

SCHOOL AND SCHOOLMASTER.

1. MATTHEWS *v.* BURDETT.

[Hill. 1 Annæ.]

IN a prohibition, &c. *for teaching a school without a license:* This case is reported in 2 *Salk.* to which may be added Mr. *Cowper's* argument against the prohibition, (*viz.*) That it appears by the books and authorities in the † margin that the licensing schoolmasters, &c. belonged to the bishop; and by the stat. 2 *H.* 4. *cap.* 15. not printed, the bishop may punish such as teach school without license; that it is very necessary such a care and power should be lodged somewhere, and in no person fitter than the bishop, and therefore he had, time out of mind, exercised this power of licensing and punishing those who teach without license, and that no other person pretended to any power to regulate in this matter, excepting only the bishop, and this both before and since the reformation, that an immemorial usage did vest a right as well in the spiritual as temporal courts, and that a legal foundation must be intended for such an usage, and even an act of parliament for that purpose, if nothing else would be sufficient.

2 Salk. 412, 672. S. C. Lutw. 1077. Moore 783. The bishop is to license schoolmasters. † Styl. Origines, 210, 211, 212. Linwood. 282. Poph. 170. Noy 181. Hutt. 100. Spar. Coll. 79, 179 225. 1 Vaugh. 327, 8. 1 Mod. 3. See Codex, lib. 10. tit. 52. Spelman Concilia 2. Voll. 176.

Dr. *Lake*, a *Civilian*, *e contra*, argued, that amongst the *Romans* there was a *jus pontificum*, but schools did not belong to them, for schoolmasters were put in by the *supreme magistrate* of the town, and he it was that paid them.

It is true, amongst the *Christians*, the bishops did erect schools, and did appoint schoolmasters, and paid them, but this was when the bishop received the whole ecclesiastical revenue, which was then wholly subject to his appointment, out of which part was appropriated for the maintenance of schools and of the clergy, but those were schools of divinity, and so not like the principal case, and few were permitted to be schoolmasters, unless they were churchmen.

2. Libel in the spiritual court for teaching school without a license; and upon a motion for a prohibition it was denied, for though the act of ‡ uniformity gives the penalty of 5*l.* for this offence, yet it doth not deprive the ecclesiastical courts of their * jurisdiction in such cases, when they proceed according to the canon, and not upon

2 Lev. 222. ‡ 13 Car. 2. See Cro. Car. 229. 1 Mod. 21. Jones 320. 1 Lev. 138. 1 Sid. 217.

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* Cap. 19.

this act for the penalty; and the canons made *anno* 21 *Jac.** and in the year 1571, before his reign, are made good and valid by the statute 25 *H.* 8. so long as they are not against the common law, or the king's prerogative, and a license of a school by a bishop, is against neither.

SCIRE FACIAS.

1. WITHERS *v.* HARRIS.

[Mich. 1 Annæ. 1 Ld. Raym. 806. S. C.]

Far. 50, 68, 69. 1 Salk. 258. S. C. † Sid. 317, 361. Judgment in ejectment after a year and a day, a scire facias must be brought before an habere facias possessionem. 6 Mod. 280. 7 Mod. 67, 69. Cumber. 250. 2 Salk. 600.

JUDGMENT in *ejectment*, and after a *year and a day* there was an *habere facias possessionem*, without bringing a *scire facias*, and adjudged, that it † ought to be brought as well against the tertenants as the defendant, because as to the possession an ejectment is a *real action*, it binds the right if the plaintiff recovers, and makes a good title: And *Holt*, Ch. Just. said, that he was not satisfied with that opinion of my *Lord Coke*, upon the statute of *Westm.* 2. that by the common law a *scire facias* would not lie upon a judgment even in personal actions, because those general words *sive alia quæcunque irrotulata*, coming after the words *conventus contracta, &c.* which are in their own nature inferior to judgments, cannot extend to judgments which are superior; but the law having been taken to be otherwise, he would not argue against it.

2. ANONYMOUS.

[Mich. 1 Annæ.]

Judgment in ejectment, one dies, execution may be taken by the survivors 7 Mod. 68, 69. It seems you may take out execution in ejectment if the defendant dies within *the year*, though not in other personal actions, unless execution be taken out in the lifetime of the parties.

AFTER judgment in *ejectment*, where there are more plaintiffs or defendants than one, after the *death* of one of them, execution may be taken out by the survivors, without a *scire facias*, upon making a suggestion on the roll, that one of them is dead; but it may be a question, where there is but one defendant, Whether execution can be taken after his *death* without a *scire facias?* (a)

(a) Q. If the words "two plaintiffs" do not mean two lessors?

3. SNOW *v.* MANUCAPTORS OF FIREBRASS.

[Mich. 1 Annæ. 2 Ld. Raym. 804. S. C. 2 Salk. 439, 602. S. C.]

SCIRE facias against the bail; the breach assigned in the writ was, that the principal had not rendered himself *prisonæ marescalli marescalciæ domini regis*, omitting the words which usually follow, (*viz.*) *coram ipso rege;* and for this omission it was insisted, that the writ was not good, for the king has *another marshal*, and that is the marshal of the household. *Sed per Holt*, Ch. Just. & *Powel*, Just. The *Earl Marshal of England*, by his office, is marshal of the King's Bench, as it appears by the book of *H.* 6. and so it continued till the reign of *King James* the First, when the office *marescalli marescalciæ*, was derived out of it; so that the marshal of the king is the marshal of the King's Bench, and no other person can be understood by it; the other is *marescallus hospotii*, and never mentioned without that addition.

Scire facias against the bail, for that the principal had not rendered himself prisonæ Marescalli, &c.

Vide 1 Wils. 155.

4. MANNING *v.* BOIS.

[Hill. 2 & 3 Will. & Mar. Rot. 645. C. B.]

AFTER a writ of error brought on a judgment in *C. B.* there was a *sci. fa. teste* 28 *Novemb.* returnable *die veneris proxime post Octibus Sancti Hillarii ubicunque tunc fuerimus in Anglia*, to shew cause *quare executionem non habet;* to which the defendant demurred, and it was held, that such writs of *sci. fa.* were made returnable sometimes at a day certain, and sometimes upon *common days;* but that this writ returnable on a day certain, *ubicunque*, &c. was naught, for it ought to be returnable on a common day, if it be *coram nobis ubicunque*, &c.

Scire facias returnable on such a day, ubicunq. tunc fuerimus, not good.
1 Vern. 46.

Post. 322.

5. GUILLAM *v.* HARDISTY.

[Pasch. 9 Will. 3. B. R. 1 Ld. Raym. 216. S. C.]

PER Holt, Ch. Just. and the court, where a *sci. fa.* is brought in *B. R.* upon a judgment in an inferior court, it must appear in the writ itself, how the judgment came into *B. R.* (*viz.*) whether by *certiorari*, or by writ of error, because the execution is different; for if it came in by *certiorari* the *sci. fa.* must set forth the limits of the inferior jurisdiction, and pray execution within those particular limits, and also that the judgment came in by *certiorari* (*a*),

Scire facias reciting a judgment in an inferior court, sicut per inspectionem, ill. Carth. 390.

(*a*) *R. ac. Hut.* 117. *Lit.* 357, 360, 363. *Vide* 1 *Sid.* 213. *Cro: Car.* 2[illegible]

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but if it came in by *writ of error*, that must be shewn in the *sci. fa.* itself likewise, and pray execution generally (*a*): And whereas the *sci. fa.* in the principal case recited the judgment in the inferior court, *sicut per inspectionem recordi nobis constat*, it was for that reason ill; for it ought to be *sicut patet per recordum*, because if the defendant should plead *nul tiel record*, it must be tried by the *record* itself, and not by *inspection*, so this *scire facias* was quashed.

(*a*) *P. ac.* 1 *Sid.* 213. 1 *Lev.* 134.

6. ADAMS *v.* TERTENANTS OF SAVAGE.

[Mich. 3 Annæ. 2 Ld. Raym. 854. S. C.]

1 Salk. 40 S. C. 2 Salk. 600, 601. 6 Mod. 199. 2 Vent. 104. Ow. 134. 6 Mod 226. Cumb. 185. 7 Mod. 69. Where a scire facias against tertenants is general, it is not proper for the defendant to plead in abatement, that there are other tertenants. 2 Cro. 506. Co. Ent. 624. Cro. Eliz. 740. Moor 524. 2 Saund. 8, 23. Palm. 241. 2 Roll. Rep. 53. *Owen 104.

IN this case (which see 1 *Salk.* 40.) it was held by *Holt*, Ch. Just. That where a *scire facias* brought against tertenants is general, as usually it is in *C. B.* it is not proper for the defendant to plead in abatement, that there are other tertenants not named, and so pray judgment of the writ, & *quod breve prædict. cassetur;* but to pray judgment, if without them, *respondere debet;* but where the *scire facias* is particular (*i. e.*) naming the particular tenants, in such case the defendant may pray judgment of the writ, and there being some doubt, whether the tertenants could plead other tertenants *in another county* not named, &c. The Ch. Just. cited * *Owen's Reports*, that tenant for years might be a good tenant to plead in bar to a *scire facias* in a personal action, where damages are to be recovered; but not to a *scire facias* in a real action.

On what judgment a scire facias would lie at common law, and what not.

7. At common law a *scire facias* would lie upon a judgment in a real *action*, because the party could have no new original; but it would not lie upon a judgment in a *personal action* till the statute of *Westm.* 2.

1 Salk. 93. 2 Sid. 12. 6 Mod. 288 7 Mod. 65, 67. Sid. 53. After a judgment is a year old, the plaintiff may have an action of debt, or a scire facias.

8. Where a judgment has slept a *year and a day*, the party shall [*not*] have either a *ca. sa.* or *fi. fa.*, but is put to his action of debt upon the judgment; or to a *scire facias*, unless he continued the process, or the defendant brought a writ of error, and the judgment was affirmed, for this is a reviver; but it may be a question, If the writ of error be *discontinued*, or the plaintiff in error be nonsuit.

1 Vent. 46. Ante 320. Difference where a scire facias is brought on a judgment in B. R. and in C. B.

9. Where a *scire facias* is brought on a judgment in *B. R.*, the plaintiff must shew where the Court of *B. R.* was held, because that court is ambulatory, *ubicunque fuerimus in Anglia;* but if it be brought upon a judgment in *C. B.* it is otherwise; because the Court of Common Pleas is confined to a certain place.

10. It was moved to set aside an execution, for that it was irregular, the defendant alleging, that when he confessed the judgment, the plaintiff and he agreed that execution should not be taken till after a year; the plaintiff insisted, that he had staid a year after the defendant had given the warrant of attorney to confess judgment; then the question was, Whether the year should be computed *from the date of the judgment*, or from the *date of the warrant of attorney? Et per Curiam*, It seems necessary that the plaintiff should bring a *scire facias*, since the execution was delayed for more than a year; however, the practice is, that if judgment upon a warrant of attorney is not entered within a year, it shall not be entered afterwards without leave of the Court.

1 Salk. 400. Ante 214. 6 Mod. Cases 14, 212. Where a judgment by warrant of attorney is not entered within a year after, it shall not be entered without leave of the Court.

7 Mod. 64.

SHERIFF. See Dissenters, 3, 133, 134.

1. THE *sheriff* is the king's officer, and therefore is always made and appointed by the king, unless in *counties palatine* (a).

2. He hath *custodiam comitatus*, and therefore hath an authority to raise the *posse comitatus* to suppress rebellions, riots, &c.

3. He hath a jurisdiction both in *criminal and civil cases*, and for this purpose he hath two courts, (*viz.*) his *turn or view for criminal causes*, which is therefore the *king's court*, because pleas of the crown can be in no other than the king's courts; the other is his *county court for civil causes*, and this is the court of the sheriff himself, and for this reason it is called the County Court.

4. It was formerly held, that if he take goods in execution by virtue of a *fi. fa.*, and is out of his office before they are sold, that in such case he could not sell and deliver the money to the party, because his authority determined with his office; but he ought to deliver such money over to the new sheriff, as he doth *the prisoners, and return, that thereupon a *venditioni exponas* may be awarded to the new sheriff.

Yelv. 44. Where he levies the goods by a fi. fa. he may sell them though he is out of his office. Vide 1 Salk. 323. Mod. Ca. 297.

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(a) The sheriff of *Cornwall* is appointed by the Prince of *Wales*. The sheriff of *Westmoreland* is an hereditary office. In *Durham*, the bishop appoints a sheriff on his creation, who continues as long as the bishop has the see. The sheriff of *Lancashire* is appointed by the chancellor of the duchy.

1 Vent. 320. Cumb. 390. 6 Mod. 299. Lut. 589. 1 Salk. 323.

5. But since it had been held, that though a new sheriff is made, yet the old sheriff may sell the goods so by him levied; but if he return the writ, that the goods are in his hands *pro defectu emptorum*, in such case a *distringas* shall go to him to deliver them over to the new sheriff, and after that a *venditioni exponas*.

Cro. Car. 539. Hob. 206, 540. Cumb. 322, 323, 430. Hut. 32. March 13. Parkinson's case. Where he levies money by a fi. fa. the party may have an action of debt against him. Vide 1 Salk. 12.

6. Where he levies money upon a *fieri facias*, the plaintiff may have an action of debt against him for the money, because it was received by him to the plaintiff's use, and the defendant is discharged of it; and it lies against his executors, if he die, for this is not like an escape, which is a wrong done by the sheriff himself, but is founded on a duty due and owing by the sheriff, which shall survive and charge his executors.

Cro. Eliz. 12, 13. Mordant's case. His office doth not determine by the descent of a barony.

7. The king appointed a sheriff, and afterwards a barony descended on him by the death of his father, his office doth not determine, but he continues sheriff notwithstanding he is a *baron* and peer of the realm.

SIMONY.

1. THIS is *studiosa voluntas emendi vel vendendi spiritualia, vel spiritualibus annexa*, and in the following cases may be seen what is *simony*, and what is not.

2 Vent. 39. Skin. 90. 3 Lev. 115, 116. Compl. Incumbent 63. Pending a quare impedit, the plaintiff sold the perpetual advowson to W. with an intention that H. should be presented, it is simony.

2. In a special verdict in ejectment, the case was: An *usurpation* was made, and a *quare impedit* brought against the incumbent, and pending that writ the plaintiff sold the perpetual advowson to *W. R.*, and the jury found, *that it was with intention that* H. C. *should be presented after the usurper was removed*, and accordingly he was presented, instituted, and inducted; the plaintiff supposing the presentation to be void, got the *King's title*, upon which he was admitted and inducted, and brought his ejectment against the defendant, and had judgment; for, *per Curiam*, the defendant was in by *simony*.

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31 Eliz. c. 6. 1 Show. 167. 2 Lutw. 1089. The King v. Gibson. 3 Lev. 16, 206. The patron was an infant, and a simoniacal agreement was made with his mother, he

*3. In a *quare impedit*, the plaintiff set forth the statute against *simony*, and that *Thornden* was a benefice with cure, which being void, a simoniacal agreement was made with the mother of the patron, who was an *infant*, and one *Crew*, that the *infant* should present *Crew*, and that in consideration thereof he should pay to her 250*l.*, &c. The defendant pleaded in abatement, that he claimed nothing in the benefice, but upon the presentation of the

infant W. W. who is not named and made defendant; and upon a demurrer to this plea, it was adjudged, that where the right of the patron is not to be divested by the judgment, there he need not be named in the writ; now in this case there was no complaint against the patron, for it was not he, but the simonist, who is the disturber, and therefore he need not be made a defendant.

(the infant) need not be named in the quare impedit.

4. In the last case the statute against simony is recited, but in the following case it is not:

ss. In a *quare impedit* against the *ordinary*, *patron*, and *incumbent*, to present to the church, *&c.*, setting forth, that it is a benefice with cure, *&c.* and that in 1681 it became void by the death of the incumbent, *&c.* then he sets forth, that during the avoidance there was a *simoniacal* agreement by which the present incumbent was presented, *&c.* The bishop pleads, that he claims nothing but as ordinary; the patron demurred to the declaration, and the incumbent pleaded, that he was *parson imparsonce*, upon the presentation of the other defendant, the patron, and traversed the simoniacal agreement; the plaintiff replied, and prayed judgment against the ordinary, and took issue upon the traverse of simony, and joined in demurrer with the patron; and it was objected against the declaration, that the *statute against simony was not recited therein*, for so are all the precedents: *Sed per Curiam, non allocatur.*

2 Lutw. 1093. The King v. Bishop of Chichester. Quare impedit good, though the statute against simony is not recited.

5. Error to reverse a judgment in a *quare impedit*, where the king had recovered upon a *simoniacal agreement*, which was, that a friend of the clerk should give *W. R.* so much money to procure him to be presented, and that he was presented *secundum agreamentum prædict.*; the error assigned was, that neither the *patron* or the *clerk* knew any thing of giving the money: *Sed per Curiam*, He was *simoniace promotus*, for being presented *secundum agreamentum prædict.*, is a good averment of a simoniacal promotion.

Sid. 329. 2 Keb. 204. Simony where neither the patron nor the clerk knew the giving any money.

6. In a *quare impedit*, the plaintiff set forth, that he had granted the next avoidance to *B.*, that the church became void; * and then he sets forth the statute made against *simony*, and during the avoidance a corrupt agreement was made between one *Richards* and the grantee of the next avoidance, that he should present one *Hide*, who was presented accordingly, which by virtue of the statute was void, *&c.*; the defendant, *Hide*, pleads with a *protestation* to the agreement, and that he had no notice thereof; and upon a demurrer to this plea it was adjudged against the incumbent *Hide*, because notice in this case is not material, by reason of the difficulty of proving it; it is the corrupt agreement which makes the simony, though the incumbent might have no notice of it.

3 Lev. 337. Where the incumbent pleaded that he had no notice of the corrupt agreement between R. and the grantee of the next avoidance to present him.

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3 Cumb. 394. 1 Cro. 180. 4 Ch. 186. March 158. Wood's Inst. 157. 1 Vern. 131. Raym. 175. 3 Mod. 297. Sid. 387.

Debt upon bond conditioned to resign upon request, good.

7. Debt upon bond, conditioned *to resign upon request;* the defendant pleads, that he did resign according to the condition of the said bond, upon which they were at issue, and the jury found for the plaintiff; and upon a writ of error brought in *B. R.* it was assigned for error, that this bond was void, because it was made upon a simoniacal agreement: *Sed per Curiam*, the judgment was affirmed (*a*).

(*a*) In *Peele* v. Lord *Carlisle*, *Str.* 227. the Court held this point to be so clearly settled, that they would not permit it to be argued. *Tamen quære,* If it has not been over-ruled in the case of the bishop of *London* v. *Fytche*, in *Dom. Proc.?*

SLANDER.

In capital offences, actionable. * Raym. 17. Vide 2 Wils. 300.

1. CASE, *&c.* for these words: * *Nuttal, who was* Solomon Smith's *clerk, is a knave and a rogue, and I will prove it*, and he is in *Newgate* for counterfeiting *the king's hand and seal*, and will *be hanged for it*, actionable.

Raym. 233. Vide 1 Roll. 51, 22, 70.

2. Case for these words: *Thou hast stole our bees*, (*innuendo*, a stock of bees,) and *thou art a thief;* after a verdict for the plaintiff, it was moved in arrest of judgment, that felony cannot be committed of *bees*, because they are *feræ naturæ: Sed per Curiam*, The subsequent words, *viz. Thou art a thief*, shew, that the stealing was of such *bees* of which felony may be committed, and so actionable.

2 Vent. 172. 2 Lev. 51. 2 Jon. 235.

3. *Case, &c.* He is a *clipper and a coiner;* after a verdict for the plaintiff, it was moved in arrest of judgment, that the words did not charge the plaintiff with *clipping or coining money*, for they may be applied to many other things; but adjudged actionable, for it must be intended, that he meant *clipping of money*, and in that sense it is usually understood.

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In capital offences, not actionable. 1 Vent. 213.

4. Case, *&c.* *He picked my pocket against my will;* he is a *pick-pocket*, not actionable, because the words do not imply that he was guilty of felony.

1 Vent. 323. 2 Lev. 205.

5. Case, *he would have given* Dean *money to rob* Golding's *house*, and *he did rob the house;* after a verdict for the plaintiff it was insisted in arrest of judgment, that the first part of the sentence imports only an inclination to rob, and the subsequent words are relative to the first; for the word *he* must refer to the last antecedent, which was *Dean*, so no charge on the plaintiff: *Sed per Curiam*, The

words may be thus construed, that the plaintiff gave *Dean* money to rob the house, and he refusing, the plaintiff himself robbed the house.

6. Case, *&c.* for these words: *He broke my house like a thief.* Upon not guilty pleaded, the plaintiff had a verdict: *Sed per Curiam*, in arrest of judgment the words are not actionable. 2 Vent. 172.

7. Case for these words spoken of a *broker*, and of his profession: He is a *cheating knave, he hath cheated me with brass money: Per Curiam*, to call a *tradesman* a *cheat* generally, is not actionable, unless the words are spoken of his *trade*. Words of tradesmen actionable. Raym. 62. Vide 2 Salk. 694.

8. Case, *&c.* brought by a merchant for these words, there being a communication of him, the defendant said: I believe all is not well with *Daniel Vivian, there are many merchants who have lately failed; and I expect no otherwise of Daniel Vivian*, actionable. Raym. 207.

9. Case, *&c.* by a *mercer*, for these words: *Thou art a cheating knave and a rogue;* after a verdict for the plaintiff the judgment was stayed, because there was no *colloquium* laid of his *trade*. Raym. 169. 2 Salk. 694. 1 Lev. 250.

10. Case, *&c.* by a merchant, for these words: *Austin Drake is broke, he is a beggarly fellow, and not worth a groat, and not able to pay his debts;* after a verdict for the plaintiff, it was moved, that the words are not actionable, for he may be an honest man, and not worth a groat; and it is no crime to be a beggarly fellow; for it may be a misfortune, and no fault: But *per Curiam*, to say *he is not able to pay his debts*, is actionable. Raym. 184. Sid. 424. 1 Leon. 276.

11. Case, in which the plaintiff declared, that he is a *keeper of a livery-stable*, and of *Bell-Savage Inn;* and that the defendant had other stables there; and that *W. R.* coming thither with a *waggon*, inquired of the defendant which was *Bell-Savage Inn?* who replied, *this is* Bell-Savage Inn; *deal not with* Southam, (the plaintiff,) *for he is broke, and there is neither entertainment for man or horse.* After a verdict for the plaintiff and great damages, the judgment was affirmed. Raym. 231. [327]

12. Case, *&c.* in which the plaintiff declared, that there being a communication of his *trade*, the defendant said: *He is a cheating knave, and keeps a false book, with which he hath cheated the country*, actionable; for though *cheating knave* is not actionable, though a *colloquium* was laid of his trade, yet it is actionable to say *he keeps false books;* for tradesmen's books are often given in evidence; therefore they must not be false. 1 Vent. 263.

13. Case, *&c.* by a *draper*, for these words: *You are a cheating fellow, and keep a false book;* the plaintiff had a judgment, but it was set aside, because he had not alleged any *colloquium* of his trade; for to say a man is a *cheating* Words spoke of tradesmen not actionable. 2 Saund. 307.

fellow, it doth not follow that he is so in his *trade*, for he may *cheat at gaming*, and the words being general, may as well be applied to that as to his *trade;* and to keep a *false book*, doth not imply that he kept a *false debt-book*, for he might keep a book which is *false printed*.

Palm. 21.

14. Case, &c. for these words spoken of a *distiller*, wherein the plaintiff declared, that he, discoursing with one *Isles*, asked him of whom he bought *aqua vitæ?* who replied, of Mr. *Godfrey*, (the plaintiff;) then the defendant said, *He is a varlet, he hath suppressed his brother's will to cozen and deceive men of their legacies, I will make him cry* Peccavi *on his knees*, &c. not actionable, because those words do not relate to his *trade*.

Vide Mod. Ca. 202. Ray. 75.

Hardr. 8. 2 Lev. 214. Vide many cases to the same effect. Com. Action on the Case for defamation, F. 7.

15. Case, &c. for these words, spoken of a *merchant*, *You are a cheating rogue, and a runagate rogue.* After a verdict for the plaintiff, it was adjudged not actionable, for to say generally, that a man is a cheater, is not actionable, unless there is a *colloquium* of his trade or profession, which was not done in this case.

1 Mod. 19.

16. Case for these words, spoken of a *watch-maker: He is a bungler, and knows not how to make a good piece of work.* After a verdict for the plaintiff, adjudged not actionable, because the words are indifferent, and have no relation to his trade (*a*); it is true, in this case the jury found that the plaintiff was a *watch-maker;* and if the words had been, *he knows not how to make a good watch, it had been actionable.*

2 Lev. 214, 233. 1 Show. 18.

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17. *Case, &c. for saying, that *she is as much a man as I am; she is a hermaphrodite:* spoken of a woman who taught girls to dance, not actionable: for it is no scandal to her profession to say, that she is an *hermaphrodite*, because men usually teach young women to dance.

Words spoke of men of professions, actionable. 2 Vent. 28. 1 Saund. 231. Vide Str. 1138. 1 Rol. 53. 4 Co. 16.

18. Case, &c. in which the plaintiff declared, that he was bred to the *law*, and practised it, and that the defendant wrote a letter to *A. C.* his client, that *he*, (the plaintiff,) *would give vexatious and ill counsel, and stir up a suit; and would milk her purse, and fill his own large pockets;* actionable by three judges, *contra Vaughan*, Ch. Just.

2 Vent. 172.

19. Case against an *attorney* for these words: *He is a cheating knave, and not fit to be an attorney;* actionable, because saying he was *not fit to be an attorney*, shews, that the preceding words, (*viz.*) cheating knave, must necessarily refer to his profession as an attorney.

1 Lev. 297. Raym. 196. Vide 1 Sid. 327. 3 Wils. 59.

20. Case by an *attorney*, in which he laid a *colloquium of his profession, and of him;* and that the defendant said, in hearing of several people, *Thou canst not read a de-*

(*a*) *Qu.* Whether, after verdict, the Courts would not now hold the words to mean—"work in his usual business." That is certainly the idea which would be conveyed to the mind on hearing such words spoken.

claration; by reason whereof, *T. P.* and *W. R.*, who were formerly his clients, deserted him. Upon not guilty pleaded, the plaintiff had a verdict; and upon a motion in arrest of judgment, the words were held actionable.

1 Mod. 272. 1 Vent. 98.

21. Case, *&c.* for these words spoken of an *attorney* of *B. R.: You are a knave on record, and a forgery knave;* not actionable, as reported by *Palmer*.

Words of professions not actionable. Palm. 441. Poph. 177. Latch. 20.

22. Case, *&c.* in which the plaintiff declared, that he is a *mercer*, and that the defendant spoke these words: *Thou art a cheating knave and a rogue.* After a verdict for the plaintiff, it was moved in arrest of judgment, that here was no *colloquium laid of his trade*, and for this reason the judgment was set aside. • In ancient time it was the constant course to lay a * *colloquium* in declarations for words; and it was a doubt whether it was good without it, till the case of *Smith and Ward*, in 2 *Cro.;* but since that case it hath been held sufficient to allege, that the words were spoken *de querente*, and *de arte sua*, which allegation shall supply the *colloquium* (*a*).

1 Lev. 115, 250. Raym. 87, 182. 2 Cro. 241, 673.

* Raym. 86.

(*a*) Mr. *Kyd*, in a note to the 3d edition of *Com. Dig.* vol. 1. p. 273., observes, that there is no branch of the law in which the decided cases are so contradictory to each other, and the decisions so frequently irreconcilable with the avowed principles on which they are said to be founded, as the action on the case for words; many of the cases cited from the old authors are certainly not law; what words are actionable, or not, will be more satisfactorily determined by an accurate application of the general principles on which such actions depend, than by a reference to adjudged cases, especially those in the more ancient authors. *Vide* the case of *Onslow* v. *Horne*, 3 *Wils.* 177., where the principles are well explained and illustrated by the Chief Justice. In the case of Ld. *Townsend* v. *Hughes*, the rule laid down by the Court was, that words should not be construed either in a rigid or mild sense; but, according to their genuine and natural meaning, and agreeable to the common understanding of all men. 2 *Mod.* 151. 1 *Mod.* 232. *Freem.* 220. To the same effect it is said, *per Curiam*, in the case of *Gardener* v. *Atwater*, 4 *Bac. Ab.* 507. that the same nicety is not, as heretofore, observed in construing words; for the rule now adhered to by all the Courts is, to understand them in their usual and obvious sense.

STATUTE. [329]

1. INFORMATION for importing *twenty pottacos of tobacco* in a vessel, not belonging to the people of this nation *contra formam statuti*. After a verdict for the informer, the judgment was set aside; because, by the sta-

Hardr. 20. Where there is an omission in the most material part of the statute, the conclu-

tute, the *goods must belong to the people of this nation;* and it is not averred that the *tobacco* thus imported did belong to the people of this nation, for it is that which makes the forfeiture, and it is none if imported in a foreign vessel, and by foreigners [*and the goods belong to foreigners*]; and the conclusion *contra formam statuti*, will not help in this case, because the omission is in the most material part of the statute which creates the offence, and which ought to be strictly pursued (*a*).

sion contra formam statuti, will not help. Postea 11. S. P. Sid. 203. Hard. 105. 1 Show. 210, 211. Cumb. 288.

2. The defendant was indicted for selling *ale in black pots* not marked, and this indictment did not conclude *contra formam statuti. Sed per Curiam*, It is good without such conclusion, because the common law appoints, that all measures should be just; therefore to sell less than measure, is an offence at common law, and this circumstance of marking the measure is only added by the statute (*b*).

1 Vent. 13. Cumb. 421. Sid. 409. Where the omission of contra formam statuti will not hurt.

3. *Information for a riot*, and concluded, *contra formam statuti* 13 *H.* 4., after a verdict for the informer, it was moved in arrest of judgment, that the information was ill, because it concluded *contra formam statuti;* whereas, the statute doth not make the offence, but appoints justices of the peace, upon complaint, that there is a riot, to view and record the same, and in what manner to punish the rioters. *Hale**, Ch. Just. of opinion, that this being an offence at common law, and mentioned in this statute, therefore the information was well concluded *contra formam statuti;* but the other judges were against him (*c*).

1 Vent. 43. 2 Salk. 460, 505. 2 Hawk. c. 23. s. 79. c. 25. s. 115. c. 30. s. 9. c. 46. s. 31. Where the conclusion contra formam statuti will hurt.
* Keiling.

4. Adjudged, That where an offence is created by a statute, which was not an offence at common law, and if that statute gives an action to the prosecutor, in such case he must shew in his declaration, that the defendant is within all the qualifications and descriptions of that statute, otherwise the action will not lie; but where the penalty is given to the king, it is sufficient to say *contra formam statuti.*

2 Salk. 505. Sid. 303. Where an offence is made by a statute, and a punishment or action given to the prosecutor, he must bring himself within the qualifications of the act. Vide K. v. Baxter, 5 T. R. M. 1792.

(*a*) If this is a case under the navigation act, it is clearly mistated; the penalty attaching on foreign property in the vessel, not in the goods.

(*b*) *Q.* If this can be law? the offence stated is not selling less than measure, but only in pots not marked, a circumstance only required by statute.

(*c*) The opinion of the three Judges is over-ruled in many cases, *int. al. K.* v. *Matthews*, 5 *T. R.* 162.

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5. PLATT *v.* HILL.

[Mich. 10 Will. 3. 1 Ld. Raym. 381. S. C.]

PER Holt, Ch. Just., Where the plaintiff *misrecites a private act of parliament*, and the judgment demurs to the declaration, judgment shall be given for the plaintiff,

1 Lev. 296. Sid. 356. 2 Salk. 566. Ray. 192. Ante 290.

for it shall be taken to be as it is pleaded, because, by the demurrer, it is confessed to be so; therefore, if the defendant will take advantage of a *misrecital* of an act of parliament, he must plead *nul tiel record*, or allege, that it is farther enacted so and so, *&c.*

Holt 662. 12 Mod. 249. Where the defendant will take advantage of a misrecital, he must not demur, but plead nul tiel record. See postea 8. contra. Vide Doug. 95. n. 41.

6. FLOWER *v.* PARKER.

[Mich. 5 Annæ.]

THE defendant was taken by process of the Court of *B. R.*, and now prayed the benefit of being discharged upon *common bail* according to the statute for discharging poor prisoners, shewing the *certificate* of the gaoler, and the adjudication of the justices. *Et per Curiam*, The justices have no authority, unless the defendant was actually in custody on such a day; for a bare being within the rules will not be sufficient; and this Court will examine the truth of it, notwithstanding this *certificate and adjudication*.

Justices, &c. have no authority, if the defendant was not in custody such a day.

7. *WINTER *v.* PRICE.

[Mich. 5 Annæ, B. R.]

THE defendant *Price*, being indebted to *Winter* in a bond of 180*l.*, conditioned to pay 90*l.* and interest on such a day, was arrested, and discharged by the justices, upon the statute of poor prisoners, upon common bail. *Sed per Curiam*, There being 20*l.* due for interest at the time that statute was made, by consequence he owed at that time more than 100*l.*, and therefore the justices could not lawfully discharge him; so their order was made void.

Justices cannot discharge a prisoner, if he owes more than 100l. to one man.

*8. *In Platt and Hill's* case before mentioned, it was held *per Holt*, Ch. Just., That if a man misrecites a *general statute* the other side cannot plead *nul tiel record*, but must demur: And then if the *misrecital* was of substance, and the party upon reciting it concludes, *vigore statuti pred.*, or *contra formam statuti pred'*, it is naught; but if he conclude *contra formam statut. in hujusmodi casu edit*, or the like, it is good.

2 Salk. 566. 8 Co. 28. a. Ray. 192. 1 Lut. 140. 3 Keb. 647. 2 Hawk. c. 25. s. 101. 1 Lutw. 140. Antea 5. Where a man misrecites a general statute, the other side must demur, but not if he misrecites a private statute.

*9. It is a safe way in pleading to set out, that a parliament was held generally *in such a year of the king*, without descending to particulars as to the *day* and *month*; as for instance, *actio non quia dicit quod in statuto in parliamento domini Willielmi nuper regis Angliæ tertii apud Westm. anno regni sui nono tent' edit' inter alia ordinatum fuit authoritate ejusdem quod, &c.*

1 Saund. 5. The form of pleading a statute. 1 Ld. Raym. 210. 1 Lutw. 140, 1409. 2 Hawk. c. 25. s. 101. 1 Lev. 106, 296. 2 Cro. 111.

10. MILLS *v.* WILKINS.

[Mich. 2 Annæ.]

2 Salk. 609, S.C. Where the mistake was in the title of the act recited. 6 Mod. 62, 136. S. C. *Hard. 324.

IN *trespass* for taking several *skins*, the defendant justified under the statute 1 *Jac.* 1. *cap.* 12., intitled an act, *&c.* but mistook one word in the *title;* and upon a demurrer to this plea it was urged, that the title is no part of the act; and that by the opinion of **Hale*, *Ch. Baron*, an act of parliament may be good without a title: *Sed per Holt*, Chief Justice, though the title is no part of the act no more than the preamble, or the title of a book is part of a book; yet, where the justification is tied to the act described, and if there is no such act, the justification must be ill; it is true, in pleading it is not necessary to set forth the title of the act, for it is sufficient generally to say, *quod inactitatum fuit;* but if a title is set forth, it is better to do it in *Latin* than in *English*. Judgment was given for the plaintiff.

Hard. 105. 1 Sid. 303. Ante 42. Where the conclusion contra formam statuti will not help. Antea 1. S. P.

Cumb. 288. 1 Show. 210, 211. 2 Salk. 611.

11. Information on the statute 35 *H.* 8. *cap.* 17., for grubbing up wood *contra formam statuti*, *&c.* After a verdict for the plaintiff it was objected in arrest of judgment, that this information was not good, because it did not set forth that the wood was *growing at the time the act made;* as upon the statute 5 *Eliz.* for exercising a *trade* not being an *apprentice* to it for seven years, it must be alleged that it was a *trade* used at the time of that act made, and for this reason the judgment was set aside; it is true, this information concludes *contra formam statuti*, but that will not help, because those words are no part of the case; they are only a conclusion upon the premises, insufficiently set forth.

[332] SUIT OF COURT AND SERVICES.

Of suit real and suit service.

1. THERE are two sorts of *suits*, (*viz.*) *suit real* and *suit service;* the first is by common law and of common right, for it is that attendance which men owe to *tourns* and to *county courts*, and the law obliges them to this service in respect of their commorancy, that there may be no want of *jurors* to do the business of those courts; therefore, he who makes default, and doth not appear there, is to be amerced; the *nobility* are excused by the statute of *Marlbridge*, *cap.* 10., now by the statute of

2 Salk. 341. 2 Inst. 122.

Merton, *cap.* 10., a man may do this suit by *attorney;* but if the *sheriff's tourn is held out of the hundred* where the party lives, then, in such case, he is excused by the statute of *Marlbridge* aforesaid.

2. *Suit service* is in respect of the *tenure*, and it is due by *reservation;* therefore, for this, as well as for all other services by which lands are held, the lord may *distrain*, if there is a default in the tenant; and as *suit real* is due to such courts which are of public institution, (*viz.*) to the *county courts and tourns*, so this *suit service* is due to the courts of *private persons*, as to *courts-baron* of particular lords of manors; and though the suitors are judges, yet they may do their services by attorney.

Suit service is due by reservation.

2 Salk. 604. 1 Salk. 341. 2 Inst. 99.

3. *In trespass*, the defendant pleads, that his father being seised of certain lands, demised them by indenture to *A.*, *habendum* to him and to his executors and assigns for ninety-nine years, if the said *A.* and *B.* should so long live; *reddendum*, after the death of the said *A.* and *B.*, his or their best beast, or 40*s.* in lieu thereof: Proviso, that no *heriot* shall be paid upon the death of *B.*, living *A.*, then *A.* died, and afterwards *B.* died, whereupon the plaintiff having the reversion by descent, distrained a *gelding;* but in the pleading it did not appear, that the distress was taken on the premises: *Et per Curiam*, This is a *heriot service*, being reserved upon a lease; and in that case there being a reversion, this is a service incident to it, and therefore must be reserved payable during the term; but where a *tenant in fee* holds of his lord by *heriot service*, such service is incident to the *tenure*, which is ancient, and must be supposed to be before the statute *quia emptores*, *&c.*, and these are seisable by the lord, either on, or out of the lands; but this being a heriot service by reservation, and not due till *post mortem A.* there can be no reversion when it became due.

2 Lutw. 1366. 2 Saund. 165. Winch. 47, 57.

1 Salk. 356. Ante 181. 3 Mod. 231. 1 Salk. 356. Cro. Car. 260. Jon. 300. Ante 181. Lutw. 1367.

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SUPERSEDEAS.

1. WHERE a *writ of error* is returnable in parliament *teste* after the *prorogation*, and a whole term intervene between the *teste and return*, it is no *supersedeas;* but it is otherwise if a less time *intervene*, or if the writ of error be returned before the *prorogation*.

Raym. 383, 384. 1 Show. 336, 353. 1 Lev. 165. Ante 266.

Where a writ of error in parliament is no supersedeas.

1 Mod. 106. 1 Vent. 100, 266. 3 Mod. 125. 2 Leon. 120. Bunb. 64, 131.

Ibidem.

2. *Writ of error* upon a judgment in *B. R.* taken out, and *teste* 1 *Novemb.*, returnable 1 *November prox'*, and a *mittimus* indorsed on the roll; in *B. R.*, it was held, that the record still remained in *B. R.*, to all purposes, and that execution might be taken out,for the *writ of error* was no *supersedeas*.

1 Vent. 266

2 Lev. 38. Writ of error coram vobis residen' is no supersedeas.

5 Mod. 230. Str. 949.

* *And ought to be brought upon and recite all the proceedings in the Exchequer-chamber.*

3. *Writ of error* in the *Exchequer-chamber*, upon a judgment in *B. R.*, and *error in fact assigned*, which not being assignable there, that Court affirmed the judgment of *B. R.*, and the record of affirmation being transmitted into *B. R.*, the plaintiff brought another writ of error there *coram vobis residen'*, and moved, that upon putting in bail it might be a *supersedeas* to the execution: *Sed per Curiam*, It was not allowed, because the judgment being affirmed in the Exchequer-chamber, *transit in rem judicatam.**

Sid. 236. Raym. 100. 1 Lev. 153. 1 Vent. 34. Writ of error in the Exchequer-chamber is no supersedeas to an action of debt on a judgment in B. R. Vide 2 Term. Rep. 643.

4. Judgment against *W. R.* in *B. R.*, and a writ of *error* brought in the *Exchequer-chamber;* afterwards the plaintiff brought an action of debt on that judgment, and the defendant pleaded *nul tiel record;* and upon a demurrer, this was adjudged an ill plea, because the writ of error is no *supersedeas to the action of debt on the judgment*, but only to the *execution upon that judgment;* besides, the record is not removed by the writ of error, but only the transcript.

1 Vent. 255. Where a writ of error is no supersedeas.

5. Adjudged, that where a writ of error is not *shewn to the other party*, or allowed by the *clerk*, by his indorsing *recepi* upon it within four days, (which is allowed as a convenient time for putting in bail, according to the statute,) it is no *supersedeas;* likewise, if, before the writ of error allowed, the sheriff returns *fieri feci*, or [*and*] *non inveni emptores*, that in such case the execution shall not be set aside.

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SUPERSTITIOUS USE.

† 1 Ed. 6. cap. 14.

1. ALL superstitious uses are void, and given to the king by the statute † of *Ed.* 6., which extends only to such uses as were made before that time, so that all superstitious uses since that statute was made, though they are void, yet they are not forfeited to the king.

2 Vern. 266, 267.

2. Whatever use is devised or given to any person or company, and which is not a charitable or good use, in the

1 Rep. 23. Porter's Case,

eye of the *common law*, or within the statute 43 *Eliz.*, seems to be a void use, and of no effect within the statute 23 *H.* 8.

23 Eliz. cap. 4.
23 H. 8. cap. 10.

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3. THE KING AND QUEEN *v.* PORTINGTON & AL'.

[Mich. 4 Will. 3. B. R.]

1 Salk. 162. S. C.
Where an averment will not be allowed to defeat a will.

IN ejectment by the *heir at law* against the devisee, the case upon evidence was, that the defendants were *Roman Catholics*, and that one of them did recommend such a priest to be confessor to the testatrix, who persuaded her she could not be saved, unless she devised her estate *to God and his Saints*, and that the defendant was an *abbess* in *France*, and joining with the confessor in the same delusive persuasions, prevailed with the testatrix to devise her estate to her, and this was urged to be evidence of a superstitious use; but the Court was of opinion, that this being an absolute devise, and no *trust* declared or appearing upon the face of the will itself, no such *averment* could be made or admitted, for if the law will not allow an *averment* to *supply a will*, *a fortiori*, there can be none to *defeat it*: *Et per Holt*, Ch. Just. The stat. 23 *H.* 8. makes such uses void, but doth not give them to the king, and the stat. 1 *Ed.* 6. gives them to the king, but doth not extend to future uses made after that statute; and that it might be convenient for the heir at law to seek his remedy in parliament, according to the case in *Moor* 784. *quod vide.*

2 Sid. 13, 34, 46. Where a limitation is to a superstitious use.

4. * Feoffment to the use of his last will; then the testator devised his lands to the *Dean of Newark* for an *obiit*, and the residue *to pay a chantry priest* 7*l. per annum* during the life of his wife, and of his *sister Edith*, *to chant for her soul*, *&c.*, and after the death of his wife and sister, then to perform divine service for 99 *years*, and afterwards to be sold, and the money to be distributed to charitable uses for the *aforesaid souls*. The feoffees made a feoffment accordingly for 99 years, rendering 7*l. per annum to the chantry priest;* then came the statute 1 *Ed.* 6. concerning *chantries*, and the question was, Whether the fee-simple or the lease only was forfeited to the king? *Et per Curiam*, The fee-simple is forfeited; for by the first feoffment and the will all was limited to superstitious uses.

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Vide 4 Co. 109.

TAIL.

Of Estates-tail, and of Leases, &c. made by Tenants in Tail.

1. SIMONDS v. CUDMORE.

* [Hill. 1 Will. 3. Rot. 743.]

* 1 Salk. 338.
Where a lease made by the tenant in tail shall bind the issue.

THIS case is reported in * 1 *Salk.*, but more clearly here, (*viz.*) *A. was tenant for ten years in possession;* the remainder was to *B. in tail*, who had likewise the reversion in fee expectant, upon the determination of the lease for ten years, and being seised of both these estates, he made a lease for years to commence at a day to come; but before that day came he died; then the issue in tail levied a fine, and declared the uses thereof to himself and his heirs; the lease for ten years expired, and then the future lessee entered, and was in possession by virtue of the lease made to him by the tenant in tail, upon whom the issue in tail entered, and the question was, Whether he was bound by this *future lease?*

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In arguing this case it was held, that where tenant in tail makes a lease to commence *in præsenti*, it is violable by his death; but if he makes it to commence *in futuro* (as in this case he had done), (*viz.*) if it be to commence after his death, it is void, because it is not derived out of his own estate and possession, but out of the estate of the issue in tail, which is paramount *per formam doni;* so if tenant in tail makes a lease to commence at a day to come, and dies before the day come, the lease is void, and the lessee is a trespasser if he enter, because the lessee had no estate or interest in the land, but only an *interesse termini* till actual entry, and the issue in tail had a title paramount and precedent to that of the lessee, which cannot be avoided. But *per Curiam*, In the principal case, the lease is not void but voidable by the issue in tail, and that only in respect of the estate tail; and therefore since this lease issued out of all the interest and estates which the lessor had, (*viz.*) as well out of the reversion in fee, as the estate-tail, and since the estate-tail is now extinguished by this fine, which hath now turned all into

an entire fee-simple, it hath thereby made the estate unavoidably subject to this lease (*a*).

(*a*) It is accordingly observed by Lord *Kenyon*, that if a tenant in tail, with reversion in fee to himself, levy a fine, the effect of that on the estate-tail is creating a base fee; and that becomes merged in the other fee, and lets in all the incumbrances of the ancestor; which has frequently happened in practice, from such a person being ill advised to levy a fine instead of suffering a recovery. 5 *Term Rep.* 109. *Roe* v. *Baldwin*. Mr. *Cruise* makes a similar observation in his treatise on Recoveries, p. 156.

2. LORD OSSULSTON'S *CASE*.

[Mich. 7 Annæ.]

Devise of a remainder to his right heirs male must be intended right heirs males of his body. S. C. 11 Mod. 189.

FORD being seised in fee, and having issue three sons and a daughter, and having likewise one brother, devised his lands to his eldest son *in tail-male*, and so to the second and third son, remainder to his own *right heirs male* for ever; the three sons died without issue; and the question was, Whether the daughter, as *heir-general*, or the brother of the testator, as *heir-male*, should have the lands? *Et per Curiam*, None shall take by those words *heirs males*, but he who is *heir male of the body of the testator*, for no collateral heir male shall take by such a limitation by way of remainder; for at common law, if land was given by a common conveyance to one and his *heirs males*, there the word *males* shall be rejected, for there was no such thing as an *heir male*, without saying of whose *body*; and, if by letters patents, lands were limited to *W. R.* and his *heirs male*, it is void, though it is otherwise in a will; and the reason is, because in a will the law supplies those words, *of his body*, and that makes it a devise to him and *the heirs males of his body*, for *heirs* or *heir male* cannot be a name of *purchase*; but heirs males of his body may: Therefore, if there is no such thing in propriety of speech, as an *heir male*, without saying of *whose body*, for that reason heir male of his body, or heirs males of itself, where the law will supply these words, *of his body*, as it will in a devise, may be a good name of purchase; but yet the party who would take by such a limitation, must be such a person as may be an heir by the *common law* (*b*), and would take by that name.

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See Counden v. Clerke, and Pibus v. Mitford.

(*b*) The proposition, that a person to take as heir male or female of the body, by purchase, must be actual heir at law, was recognized, and this case was cited as an authority, by Ld. *Macclesfield*, in the case of *Dawes* v. *Ferrers*, 2 *P. Wms.* 1.; it is also maintained in a note by Mr. *Hargrave*, to *Co. Lit.* 24. b.; but it was ruled in the case of *Willes* and *Palmer*, 5 *Bur.* 2615., that a person might take as heir male of the body, by purchase, without being heir general; whereupon Mr. *Hargrave*, in a subsequent note, guards the reader against incautiously adopting his private ideas. 164. a.

3. LEE v. BRACE.

[Mich. 8 Will. 3. B. R. 1 Ld. Raym. 101. S. C. Carth. 343. S. C. 12 Mod. 101. S. C. 5 Mod. 266. S. C. Vide also Fearne C. R. 54.]

Feoffment to the use of his son and his heirs, and for want of issue of him, remainder over is an estate-tail.

A FEOFFMENT was made to the use of the feoffor for life, remainder to *W. R.*, his son and *his heirs;* and *for want of issue of him*, then to the right heirs of the feoffor: Mr. *Northey* objected, that though this would have been an estate-tail in *W. R.* by a *will*, yet the authorities which prove it to be so, do likewise prove, that it would be otherwise in a *deed*, as in this case. *Sed per Holt*, Ch. Just., *Non allocatur*, for this is but one entire sentence of limitation, the intent whereof is very plain, and the rule of law is only, that an estate of inheritance cannot pass without words of inheritance; but there is no rule in law, that words of inheritance may not be qualified or abridged by subsequent words; therefore, in this case *W. R.* hath only an estate-tail, though by deed, it being in one sentence; for though the first words of that sentence, (*viz.*) to his son and his heirs, make a fee-simple, yet the subsequent words, (*viz.*) and *for want of issue of him*, make an estate-tail, by qualifying and abridging the first words, and in creating entails, *voluntas donatoris observanda est* (*a*).

(*a*) *R. ac. Lit. Rep.* 253, 285, 315, *Lit.* 21. a. *Plowd.* 541. a. *Hob.* 172. 344. *Cro. Car.* 265. *Vide ac. Co.* Note to 1 *P. Wms.* 57.

4. PIBUS v. MITFORD.

1 Freem. 370, 371. 1 Vent. 372. 2 Lev. 75. Raym. 228, 159, 273. 2 Mod. 207. 1 Mod. 121, 159 Sid. 98. Where an estate for life shall be raised by implication, and united to a limitation of the lands to the use of his heirs males begotten of his body, so as to make an estate-tail executed in himself. Fearne's C. R. 49. (30.)

IN a special verdict in ejectment, the case was: The father being seised in fee, had issue *Robert* by the first venter, and *Ralph* and *Jane* by the second venter; and he *covenanted to stand* seised to the use of himself for life, remainder to trustees to several purposes, remainder to *Jane* for life, remainder to *Ralph* and the heirs males of his body, and of his lands in *W.* (being the lands now in question) to the use of his *heirs males begotten on the body of his second wife:* The father died; and the question was, Whether by this limitation any use did arise to *Ralph*, who was his heir male by the second wife? and adjudged that it did, because his father had an estate for life in these lands in *W.*, not by express limitation, but by operation of law, which being united to the estate limited to the heirs males of his body, makes an *estate-tail;* now this being in a *covenant to stand seised*, and no *transmutation of possession*, (as it was in *Greswold's case*,) so much of the old use which was not disposed of by the covenantor, still remains in him, for there is nothing to take it out of him (*b*),

(*b*) *Co. Lit.* 23.

(and so is *Counden and Clerk's case*, and *Bingham's case*); so that the old use being still in the father, who was the covenantor, this *estate for life* shall be raised in him by *implication of law*, to preserve and support this limitation, (*viz.*) *to the heirs males of his body*, so that this is an estate-tail executed in him, and by consequence after his death it shall be to *Ralph* his son, as a *contingent remainder*.

5. MERREL *v.* RUMSEY.

BY a marriage-settlement and *fine* levied, *&c.* to the use of husband and wife for their joint lives, remainder to the *heirs of the body of the wife* by the husband to be begotten, remainder (the wife surviving the husband) to her for life, remainder to the right heir of the husband; *per Curiam*, This is an estate-tail executed in the wife; it cannot be a contingent remainder, because that never is but in cases where the particular estate may determine before the contingency happens.

1 Keb. 888. Sid. 247. Raym. 127. Where an estate-tail is executed, and where the remainder is not contingent. Co. Lit. 26. Harg. n. 3. Yelv. 131. Fearne C. R. 34. (24.)

TALES.

1. COOK'S *TRIAL*, FOL. 12, 13, 14, 15.

AT the sessions of gaol-delivery for the trial of *Cook* for *high treason*, the Court could not have a full jury by reason of defaulters, and the many challenged by the prisoner; whereupon the Court adjourned to another day, and ordered another pannel to be then ready; it was objected, that there ought to be a *tales*, and an *habeas corpora*, to complete the number of *nine jurors*, who were already sworn, for otherwise this record would be left imperfect. *Et per Curiam*, Wherever the jury is summoned by a *venire facais* to try a particular issue, there may be a *tales*, because there is a writ upon which it may be grounded; but where there is no *venire facias* it is otherwise; for there can be no *tales* but with an *habeas corpora* to bring in the first jurors: Therefore, in the case of *oyer and terminer*, though perhaps there may be such a course, yet in commissions of gaol-delivery it cannot be; and it is very plain that it is not necessary; for in such cases the course is for the justices before they come to

Where the jury is summoned to try a particular issue, there may be a tales, where not. Vide 2 Hal. Hist. P. C. 266.

court, to send a written precept to the sheriff generally, to return jurors against their coming in order to deliver the gaol; and out of those pannels the jury is called; and without any writ or precept in writing; and the entry is no more than thus; (*viz.*) that *W. R.*, the prisoner, pleaded not guilty, *ideo immediate veniat inde jurata*, and this is always before issue joined, and therefore it is never to try a particular issue; and in this respect the proceedings of *oyer* and *terminer* differ, that they do not send a general precept to the sheriff before issue joined, but a particular precept after issue joined, to summon a jury to try a particular issue, so that this is a precept in nature of a *venire facias*; upon which account, perhaps, a *tales* may be grantable: But here it is otherwise, because there is neither a particular *venire facias*, or precept in the nature of one.

Raym. 367. Keb. 490. 6 Mod. 246. 1 Lev. 223. A tales is never awarded on an indictment, unless there is a warrant from the attorney-general.

2. A *tales* is never awarded upon an *indictment*, unless by warrant from the *attorney-general;* but it is awarded upon an information *qui tam*, &c., because of the interest which the prosecutor hath in such prosecutions (*a*).

(*a*) 4th and 5th *Ph. & M. c.* 7.

TAXES.

Grand customs.

1. THE grand custom of a *mark* and *demi-mark on woolfels and leather*, and also *prisage*, (*i. e.*) one tun of wine before the mast, and one tun behind the mast of every tenth tun, were due to the king by common law; and these are implied by the words *recta & antiquæ consuetudines in magna charta;* but petty customs, or *parvæ custumæ*, begun *anno* *31 *Ed.* 1., and were made perpetual by 27 *Ed.* 3. *cap.* 26.

*Cap. 30.

Tonnage and poundage.

2. *Tonnage and poundage* is by an act of parliament; and was never granted for any longer time than for one or two years, till the 31 *Hen.* 6., when it was granted to that king for life; and not only for the *ordinary defence of the sea*, but that the king might have a stock of money always ready for that purpose, &c.

3. BREWSTER v. KIDGELL.

[Hill. 9 Will. 3. B. R. 1 Ld. Raym. 317. S. C.]

THIS case is reported in 1 *Salk.*, but more clearly, and yet more at large, as followeth, (*viz.*) It was a feigned action upon a *wager*, in which the question was, whether the plaintiff might deduct 4 *s.* in the pound, being so much charged on the lands by the statute 4 & 5 *Will.* 3., and power given to deduct it, with a proviso not to alter any covenants or agreements between the parties.

1 Salk. 198. S. C. Of taxes, subsidies, and assessments.

The jury found that *R. Langford* being seised in fee of these lands, did, in the year 1649, grant a *rent-charge of* 40 *l. per annum*, issuing out of the same to the *grantee and her heirs;* and on the back of this deed there was this *memorandum* indorsed, (*viz.*) *That it is the true intent and meaning of these presents, that the grantee and her heirs should be paid the said rent-charge, without deduction for any taxes for the rent or lands therewith charged;* and afterwards by another deed he covenanted to pay it *free from all taxes: Et per Holt*, Ch. Just.,

The word *taxes*, generally spoken, with reference to any freehold, or where the subject matter will bear such reference, shall be intended * *parliamentary*, and this *propter excellentiam;* but there are other taxes not *parliamentary*, such as are for repairing churches; taxes imposed by commissioners of sewers; and generally, any † imposition which takes away part of a man's goods or rent, may properly be called a tax.

* 34 H. 8. Quinzesme 9.

† 2 Inst. 532.

The ancient way of *taxing* was by *tenths and fifteenths*, then by *subsidies*, afterwards by *royal aids*, and at last by a *pound rate;* the former were all upon the person and the personal estate, and were much the same; but the last was upon *lands and rents.*

Anno 18 *Ed.* 3. a valuation was made of all the *towns in England*, and returned into the Exchequer, and this became the standing rule for taxing every town, (*viz.*) when a *tax* was given, the officers of the Exchequer presently knew to how much it amounted *for every town;* and the inhabitants taxed the landholders and occupiers of lands; and they were charged and paid their proportion, though they held at a rack-rent.

2 Inst. 76. 77. 11 H. 4, 35, 36. Br. Quinzesme 9.

The first *subsidy* was granted *anno* ‡ 32 *H.* 8.; and this was a tax upon the person, both for *his lands and goods*, and payable by him where he lived; and this continued till the 15th *year of Car.* 1.

‡ Cap. 50.

About two years afterwards, (*viz.*) *anno* 17 *Car.* 1., the first *assessment* was made upon lands and rent, according to a *pound-rate;* and by this and other statutes there was

a clause for the tenant to deduct the *taxes;* and so it was in the years 1642, 1644, 1659; and when by the agreement of the parties the *taxes* were not to be deducted, there was usually a clause in all deeds for that purpose, as it was in this deed, and at that time that there should be no deduction for taxes; so that if this covenant or *memorandum* had been made in the year 1640, it would not have extended to those taxes, because there were no such then in being, or known in the law, and therefore could not have been foreseen by the grantee without a prophetic spirit; but being frequent and in use when this deed was made, he must intend that the rent-charge should be free from these taxes; otherwise he intended nothing by this *memorandum* and the other deed.

Mod. Cases 306. Assessors of taxes indicted for a misdemeanor.

4. The defendants were indicted for a misdemeanor; for that being assessors and collectors of the public taxes in such a parish, they assessed some too high, and omitted others, and yet they levied the money on those who were omitted, and converted it to their own use, for that their names were not set down in their books; and being convicted, and coming now to receive judgment, it was moved, that no corporal punishment might be inflicted on them, because the crime was not of an infamous nature: *Sed per Curiam,* they were adjudged to the pillory in the county where the crime was committed; and that the marshal should carry them down, and a writ should go to the sheriff to assist him in the execution of this sentence.

TENDER.

Sid. 13. Refusal, where traversable. Sid. 364.

2 Vent. 109.

1. WHERE a *tender and refusal* is pleaded, it is the refusal which is traversable, and not the tender: for it is that makes it a payment in law, and not the tender; and wherever the demand is certain, or a certain sum claimed in the declaration, there a *tender and refusal* is a good plea; and a tender is not well pleaded without a *refusal.*

2 Salk. 623. 2 Lev. 23. Ld. Ray. 687, 964. 2 Vent. 107. Where a tender is pleaded without a refusal to

2. Debt upon bond conditioned to pay 12 *l.* on the 15th *of August and on the* 15*th of Feb.*, by equal portions; the defendant pleaded, that *on the* 15*th of August* there was 6 *l. due,* which, on that very day at *B. obtulit solvere,* and was ever after * ready to pay; and afterwards, (*viz.*) on the 15*th day of December,* he did pay it to the plaintiff, who

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accepted it; and upon a demurrer to this plea it was adjudged ill, because the defendant pleaded a tender without a refusal to accept; and his accepting it afterwards will not help; it is true, if there had been a certain place of payment mentioned in the condition of this bond, and the defendant had shewed that the plaintiff was not there ready to receive it, this might be good, but here was no *certain place* appointed.

accept, it is not good, unless a certain place of payment is appointed.

3. In debt for rent, the defendant pleaded in bar, that he *paratus fuit* at the day and place, *&c.* to pay it, and that ever since he hath been ready, *& profert hic in Curia* the rent, and so *petit judicium de damnis;* and upon demurrer to this plea it was objected, that it was ill, because the *time and place of payment being certain*, it is not good to say *semper paratus fuit*, without alleging, that *obtulit se solvere*, and adjudged accordingly.

3 Lev. 104. 12 Mod. 353. 2 Lev. 209. Where the time and place are certain, semper paratus is not a good plea, without alleging obtulit se solvere.

4. Debt for rent, the defendant pleaded, that he was at the house on the day, *&c.* for an hour *before sun-set*, and staid there on the same day till sun-set, *ready to pay the rent*, and that nobody was there to receive it; and that since that day he always was, and yet is ready to pay the same, *& denarios illos idem defendens hic in Curia profert parat. fore solvend. eidem* (the plaintiff) *si illos de eodem* (the defendant) *accipere velit & hoc, &c.* And upon a demurrer to this plea it was objected, that the defendant did not plead *a tender* at the day, but only that he was then ready to pay the rent: *Sed per Curiam*, the plea is good without a *tender*, but it had not been so in an action of debt on a bond, for there a tender must be set forth to save the breach of the condition.

Raym. 418. Where semper paratus is a good plea without a tender.

5. LANCASHIRE *v.* KILLINGWORTH.

[Trin. 13 Will. 3. B. R. 1 Ld. Raym. 686. S.C. Comyns 116. S.C.]

THERE is a short note of this case reported in 2 *Salk.* by the name of *Lancashire* versus *Killegrew*, but the case was thus: *ss. In covenant*, the plaintiff declared, that the defendant's testator covenanted with the plaintiff, upon two days notice, at any time within one year, to accept 1000 *l.* joint stock of the *Hudson's Bay company, at the Hudson's Bay house;* and that upon the transfer thereof he would pay the plaintiff 2000 *l.;* the plaintiff avers, that on the *second day of Novemb.*, *&c.* he gave notice to the defendant to come on the *fourth day of November*, (which was within the year) *to the Hudson's Bay house*, and then there to accept the transfer of 1000 *l.* stock, and that the plaintiff *was ready there*, and offered to transfer it, but the defendant did not accept it, neither had he paid the

12 Mod. 530, 533. 2 Salk. 623. S. C. Where the place and time are certain, it must be set forth in the pleading at what time he came, and how long he staid.

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2000 *l.* Upon a demurrer to this declaration, *Holt*, Chief Justice, held, that if the tender had been well set forth, the plaintiff would have a good title to the 2000 *l.* for if he he hath done all which he can do, in order to accomplish what he had agreed to do, it is as effectual and sufficient as if he had actually transferred the stock. But here the *tender* is not well pleaded; for where it is pleaded at *the place appointed*, as in this case it was at *the Hudson's Bay house*, and no one there to accept the transfer, he ought to shew, *at what time he was there on that day, and how long he staid;* for he ought to shew that he had done his utmost endeavour to accomplish his * agreement: It is true, he need not set forth, that neither the defendant, nor any body else in his behalf, was there, because it shall not be intended that another was there for him; but if the truth was so, it must be set forth on the other side: Now, as to the *time*, it is the last time of the day, which the law appoints for a *tender*, but yet not so late in the day but that there may be time enough for the execution of the agreement in what is tendered: Now, in the principal case, the stock can never be transferred but when the Company's house is open, and that is usually at set hours, as at ten of the clock in the morning; therefore the plaintiff should have set forth and averred the usage of the Company, and that he came at the proper time and staid there till after the house was shut.

* Yelv. 38.

3 Cro. 754. Yelv. 38.

6. GILES *v.* HART.

[Mich. 9 Will. 3. 1 Ld. Raym. 254. Carth. 413. S. C.]

2 Salk. 622. In debt on a bond to pay a certain sum on a day, there a tender on the day, and semper paratus, is a good plea, but not in assumpsit.

THIS case is reported in 2 *Salk.*, (which see there,) to which may be added the opinion of the *Chief Justice Holt* in this case, (*viz.*) In an *indebitatus assumpsit* for wares sold and delivered; the defendant pleaded a *tender* on such a day, and *that he hath been ready ever since to pay, &c.;* and upon demurrer to this plea he held, that where an action of debt is brought upon a bond conditioned to pay a certain sum on a certain day, there a tender at the day, and that he hath been ready ever since to pay is a good plea; but it is not so in *assumpsit;* for though he might be ready to pay ever since the tender, yet that being after the promise made, and probably after it was demanded to be paid, it is not good, for it not being paid, the promise is broken, so it is likewise in debt upon a single bill; therefore in these cases the defendant must plead *semper paratus:* He held, that in an action of debt *tender and refusal* might be pleaded in bar of the *damages*, but not in bar of the *action*, for the debt still remains: That in *assumpsit* a tender likewise might be pleaded in bar of the damages; but of this there hath

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been some doubt, for he held, that in such case the whole demand being in damages, a plea in bar to the damages goes in bar to the action; therefore he said he should favour any course to help a defendant in such case, as by allowing him to bring a sum of money into court, and praying judgment, *de ulterioribus damnis*, or by confessing damages to so much, which he is ready to pay, and pray that the plaintiff may proceed at his peril.

Dyer 300. b.

7. HORNE *v.* LEWIN.

[Trin. 1699. B. R. 1 Ld. Raym. 639. S. C.]

IN *avowry for rent*, the plaintiff replied, that he was ready upon the land on the day of payment till *sun-set*, and no one was there to receive the money, and that he is still ready to pay it, and so *petit judicium & damna*, this was adjudged naught; but if it had been *petit judicium de damnis*, it had been good, for his being ready to pay excuses the damages, but doth not bar the other of his rent.

2 Salk. 583. S.C. Petit judicium & damna, not good; it should be de damnis, good; de damnis is not good without an *obtulit*. Hob. 207. 2 Salk. 583.

TENOR. See Libel, 2.

TERM AND VACATION. [345]

1. A RECOVERY was suffered on the first day of *Michaelmas term, about eleven of the clock in the morning*, and the recoverer died in the same morning, about two hours before; yet this was adjudged good, for the writ was returnable three days before, and the judgment shall *relate* to that day.

Sid. 229. Where judgment shall relate to the day R. ac. Shelly's case, 1 Rep. 93. Mo. 136. Vide Wynne v. Wynne, 1 Wils. 35. 2 Cruise 59.

2. The *essoin-day* is the first day of every term in respect to legal proceedings, and judgments shall relate to that day, and not to the *quarto die post*; but if a man is bound to appear, or to pay the money on the first day of the term, *tunc loquimur ut vulgus*, and then the *quarto die post* is the first day.

1 Cro. 102.

2 Cro. 16.

3. *St. John's day, non est dies juridicus*, and therefore the judges never sit on that day, unless it happens to be the *first day of the term.*

1 Roll. Rep. 29.

4. If the next *Friday* after *Corpus Christi* day happens to be on *Midsummer-day*, yet that must be a *hall-day*, though otherwise it would not, for the *Friday* next after *Corpus Christi* is appointed by the statute to be the first day of *Trinity term;* and if this be not reckoned, the term would not begin till *Friday in the next week following.*

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TIME. See Issues joined, 1.

1. SCOTT *v.* HOGSON.

[Trin. 11 Will. 3. B. R.]

Assumpsit to run a horse at such time as the plaintiff shall appoint, and he sets forth that he appointed such a day, good.

ASSUMPSIT to run a horse at *such time* and place as the plaintiff should appoint, and the plaintiff declares, that he did appoint *such a day;* it was doubted, whether this was appointing a *time*, which is more certain and determinate than *a day:* But *per Curiam*, by appointing a day the law will supply the rest, and fix it to the most usual and *convenient time* of that day.

2. DAVY *v.* SALTER.

[Mich. 3 Annæ, B. R.]

Mod. Cases, 230. 6 Salk. 626.

A WRIT of inquiry was executed *in tres septimanas Trin.* (which was on *Sunday* the 13*th day of June*), and the writ was returned to be executed on the 14*th day;* and upon a writ of error brought it was insisted, that the court could not take notice of *the* * *days of the month*, if they did, then † *Sunday* ought not to be reckoned, *but Monday* instead thereof; that if *Sunday* be the first day of the *term*, all judgments will be on a *Sunday*. *Et per Holt*, Ch. Just., If *Sunday* happen to be the *quarto die post*, it must of necessity go to the *Monday* following; and so it is of *essoins*, for they cannot be held on a *Sunday;* and as to the *relation* of judgments to the first day of the term, it can only be to the first juridical day, and all *quindenas & octabis* are exclusive. In this court the entry is, *die Lunæ*

* 1 Cro. 275. Jones 300. 1 Roll. Abr. 595. Yelv. 140.
† 1 Cro. 11. 2 Cro. 16.

proxima post, &c., which is inclusive; in the Common Pleas the entry is, *a die &c.*, and yet this is inclusive of the day; and he was of the same opinion as in *Harvey and Broad's* case.

3. Submission to an award by bond dated 12 *Septemb.*, so as it be made within six days after the date of the bond, and it was made on that very day on which the bond was dated. *Et per Curiam*, It is good, because that day shall be inclusive, and be taken to be one of the six days.

Styles 382. Latch. 14.

4. *Moved to quash an indictment upon the *statute* 13 *H.* 4. *cap.* 7., for a riot, because inquisition was not taken within a month, (*viz. twenty-eight days*) after the offence committed, which is expressly required by the statute: *Sed per Curiam*, The time shall be computed, not according to *twenty-eight days*, but according to *kalendar months* (*a*).

Sid. 186. 4 Mod. 96. Computation of time according to the kalendar.

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(*a*) Mr. *Hawkins* says, upon this subject, that it is not clearly settled, whether the month must be reckoned according to the computation of a lunar or a solar month. *Book* 1. *ch.* 65. *s.* 31. But in 2 *Comment.* 141., it is said, that a month in law is a lunar month, or twenty-eight days, unless otherwise expressed. There are many other authorities to the same effect, for which *vide Com. Ann.* B. But in ecclesiastical proceedings or statutes relating thereto, the month is computed by the kalendar. *Ibid.*

TITHES

1. ALL things titheable which grow from the earth immediately, either as a natural product thereof, or by the industry of men, as *corn, hay, wood, herbs, &c.*, are called *predial tithes.*

What are predial tithes. Vide 2 Bl. Com. 24.

2. But those which do not arise immediately from the earth, as cattle, *&c.*, and which are not the product thereof, but are nourished by it, the tithe thereof is called *mixt tithe.*

What are mixt tithes.

3. But *personal tithes* are from and in respect of the *labour of men.*

What are personal tithes.

4. All small *wood*, under *timber*, and likewise timber, when cut down under twenty years growth, is called *sylva cædua*, and titheable; but timber-trees, after twenty years growth, are not titheable, neither are the *loppings* or the *bark*, or the *boughs* of such trees titheable, because part of the trees themselves.

Wood and trees.

Sylva cædua, where it pays tithes, where not.

5. *Sylva cædua* cut down to *sell* shall pay tithes, but not to *burn* in the house, or to repair the same, or to inclose, or to enlarge the house for necessary habitation.

1 Roll. 637. Roots grubbed up shall not pay tithe.

6. If a *coppice* is cut, and the tithes paid, and afterwards the *roots* are grubbed up, they shall not pay tithes, because they are parcel of the inheritance, and of the land.

Cro. Eliz. 477. Trees more than twenty years growth pay no tithe.

7. *Timber-trees mortuæ, aridæ & putridæ*, pay no tithes, for being once discharged by being upwards of twenty years growth, they shall be always discharged.

Discharge of tithes.

8. *Tithes may be discharged three ways, either by *real composition, de modo decimandi*, or *by prescription*. (2.) By a general *prescription, de non decimando*. (3.) *Or by grant.*

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Jones 368. Hob. 307. Discharge de modo decimandi.

9. A discharge by *real composition de modo decimandi* is where money or land is enjoined by the parson, time out of mind, in lieu of his tithes; in this case the law always intends a contract, or original bargain, and this is a charge which runs with the land, and whereof any lay owner shall take advantage, for the *modus* is become the tithe, and the very tithe in specie is extinguished.

Jones 368. Cro. Car. 422. Hob. 307. Hard. 315. Discharge by prescription.

10. (2.) A discharge by *prescription in non decimando* is a privilege only incident to spiritual persons; for as they are only capable of tithes in pernancy, so they only can discharge themselves by a general *prescription in non decimando;* this is therefore a *personal privilege* which doth not run with the land, so that if it be conveyed over, tithes must be paid in specie.

Discharge grant.

11. (3.) A discharge *by grant*, and this is either to *particular persons* or *corporations* by the *pope's bull*, or to whole orders of men by act of general council, as to the *templars, hospitallers, cistertians, &c.;* and this privilege is also personal, and cannot pass from one person to another; so that if the land be conveyed over, or reverting to the founder, the alienee and the heirs of the founder shall pay tithes.

By the statute 27 H. 8.

12. Now these *personal privileges* are to be considered as they stand affected by the statute 27 *H.* 8., by which statute all abbeys, *&c.* under the yearly value of 200*l. per annum*, are given to the crown; because there is no clause in that statute to revive and save all personal privileges belonging to the *abbeys, &c.*, therefore they are destroyed and extinguished.

By the statute 31 H. 8.

13. By another statute 31 *H.* 8., all *abbeys, &c. above the value of* 200*l. per annum*, are likewise given to the king, and in that statute there is a clause to revive and preserve all former privileges.

1 Cro. 423. Jones 368. Hob. 307. Hard. 101.

14. Therefore these, whether discharged by *prescription, grant*, or *composition*, in the hands of former owners, continue in the same manner discharged of tithes in the hands of the king or his patentees.

15. WHARTON v. LESLE.

[Trin. 5 Will. 3.]

IN a parish consisting of 700 *acres of arable* and 700 *acres of pasture lands;* there were *twenty-six acres sowed* with *flax;* adjudged by *three Judges*, *contra Holt*, Ch. Just., that the tithes thereof belong to the *vicar* as a small tithe, being so in its nature; but the *Chief Justice* held, that the nature of the tithes depends upon the nature of the thing itself, and not upon the nature of the place where it is sown.

3 Lev. 365. 4 Mod. 183. 3 Cro. 467. Hutt. 73. Moor 99. Owen 74. 2 Atk. 364.

TRADE.

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1. MAYOR OF WINCHESTER v. WILKS.

[Pasch. 4 Annæ, B. R. 2 Ld. Raym. 1129. S. C.]

THE corporation of *Winchester* declared upon a custom, that it was not lawful for any person to exercise a *trade* there, except *homines liberi gildæ mercatoriæ civitatis illius*, &c. *Et per Curiam*, it was agreed, that such a custom in *London* might be good, because their customs are confirmed by many acts of parliament; but it was doubted, whether such custom was good in any other city or borough, for since the defendant is at liberty to live in that place, it is unreasonable to restrain him from using a lawful means for his support and livelihood: However, *per totam Curiam*, this declaration is naught; for *non constat*, that the corporation hath *gilda mercatoria;* and it doth not appear whom the *homines liberi de gilda mercatoria* are; so they may be the whole corporation, or some part of them; and anciently the king's grant to have *gildam mercatoriam*, made them all a corporation, (*viz.*) all the whole vill.

Mod. Cases 21. 1 Salk. 203. S.C. Whether such a corporation hath gilda mercatoria.

2. BRIDGET GLASS'S *CASE*.

[Mich. 8 Will. 3.]

* Cap. par. 7.
Information where it must be brought in the proper county.

SHE was indicted before *commissioners of oyer and terminer at the Old Bailey, on the statute* 1 & 2 * *Ph. & Ma.*, by which it is enacted, *That no person living in the country shall sell any haberdashers wares by retail, in any city or town corporate, except it be in open fairs, on pain of forfeiture for every offence,* 6 *s.* 8 *d., and of the wares sold; the one moiety to the king, the other to him who shall seize, and sue for the same in any of the king's courts of record, by bill, plaint, debt, information or otherwise, &c.*: And, that the defendant did sell *haberdashers wares, &c. contra formam statuti:* Mr. *Northey* moved to quash this *indictment*, upon the authority of † *Gregory's* case, and of ‡ *Farrington's* case, because those words, (*viz.*) *The king's courts of record*, extend only to the *courts at Westminster: Et per Curiam*, It is true, justices of peace have not any jurisdiction in this case; but it hath been ruled since *Gregory's* case, that *justices of oyer and terminer* may determine this matter by way of *indictment*, though not by *information:* But since the statute hath prescribed a particular way to recover the forfeiture, (*viz.*) by action of debt or information, without mentioning an indictment, therefore the defendant is not indictable upon this statute; for which reason this indictment was quashed.

† 6 Rep. 19.
‡ 1 Cro. 23.
Vide 2 Bur. 799.

3. MARY REED'S *CASE*.

Indictment for using a trade, not good.

SHE was indicted for using the trade of a linen-*draper* at *B.*, not having served *seven years apprenticeship* to that trade; the caption was *ad generalem sessionem pacis tent. coram majore and burgesses of Bridgwater, infra burgum de Bridgwater;* it was objected, that an indictment for this offence cannot be taken at *a sessions of a town-corporate, but only at the general quarter-sessions of the county;* and this by virtue of the statute 31 *Eliz.*; and even in that case it will not be sufficient to say, *ad generalem sessionem;* but *ad generalem quarterialem sessionem pacis, &c.*

4. THE KING *v.* HICKS.

[Mich. 4 Will. 3. B. R.]

1 Salk. 373.
§ Cap. 4.

INFORMATION was brought against the defendant upon the statute § 5 *Eliz.* for using the trade of, *&c.* not being apprentice to it for seven years; the informa-

tion was brought in this court, and the using the trade was in *Yorkshire*. *Et per Curiam*, This information will not lie here, because by the statute 21 *Jac.* it must be brought in the proper county, and all informations against the form of the statute will be void.

Sid. 303. vide 400. Carth. 290, 291.

5. THE QUEEN v. ELIZ. FRANKLYN.

SHE was indicted at a *quarter-sessions of a borough*, for exercising a trade, not having served seven years *apprenticeship*, and Mr. *Eyre* moved to quash it, because the prosecution was [*not*] commenced a year after the offence was committed. *Et per Curiam*, Upon view of the statute of 5 *Eliz.* where a moiety of the forfeiture is given to the informer, he must prosecute within the year; but the queen's suit is not confined to the first year (*a*), but she shall have another year, where the forfeiture is distributed by moieties, and in such case, where the party neglects the first year, she shall have the whole.

1 Salk. 370. S. C. Quashed on another exception. 6 Mod. 220.

6. A *pippin-monger* is no trade within the stat. 5 *Eliz.*, but a *brewer* is, *quære* of an *upholsterer*; but *plowing and digging* are not trades within the statute, for it is not matter of skill, but of strength.

1 Roll. Rep. 10. Sid. 367. 1 Show. 325, 326. 2 Salk. 611. 1 Lev. 243. What trade is within the statute, what not. Vide 1 Hawk. 6th edition, page 565. Com. Trade, D. 5.

(*a*) The queen has two years after the offence, if no share of the penalty is given to the informer; if such share is given, two years after the expiration of that allowed to the informer. 31 *Eliz.* ch. 5.

TRAVERSE.

1. ANONYMOUS.

[Hill. 1 Annæ.]

THE defendant was sued by the name of *John*, and he pleaded, that he was *baptized by the name of Benjamin*, and traversed, that *ipse idem Johannes* was ever known by the name of *John*; and upon a general demurrer to this plea, *per Holt*, Ch. Just. This *traverse is repugnant* in itself, and very immaterial, for it had waived the precedent matter of *baptism*, which was well pleaded,

Where a traverse is repugnant. Ante 238. Skin. 620. 1 Salk. 6, 15. 4 Mod. 347. 6 Mod. 115, 116. 7 Mod. 104. Cumb. 188. 2 Show. 394.

and was now become the substance of the plea itself; for now the issue must be by what name the defendant was *called or known*, and not by what name *he was baptized*, whereas he ought to have relied on his name of *baptism*, and concluded with it without a traverse, for a man can have but one name, therefore it implies a *negative* in itself, without saying he was never known by the name of *John*, &c.

1 Salk. 6, 15. Vide Rep B R. Temp. Hard. 286

2. BULLEN *v.* BENSON.

[Mich. 10 Will. 3. B. R.]

Where a plea is not good without a traverse. 2 Salk. 628.

DEBT upon a sheriff's bond for an appearance, dated 20 *Nov.*, 9 *Will.* 3., conditioned, that the defendant should appear in *B. R. die Lunæ prox. post. quinden. Sancti Martini*, &c. The defendant pleaded the statute, and that the bond was *primo deliberat.* by him 30 *Novemb.*, and that he was then taken and arrested by the plaintiff by a writ returnable in *Michaelmas term*, &c. in *B. R.*, and being so in custody the plaintiff took this bond, & *hoc paratus est verificare.* And upon a demurrer to this plea it was adjudged ill, for when the defendant had pleaded, that the bond was *primo deliberat. on the* 30*th day of November*, he should not have rested there, but have traversed, that he delivered it on the 20*th day of November*, according to *Yelverton* 138., for here the *date* is material; for supposing the arrest was before the return of the writ, and then after the return the plaintiff took a bond antedated; this bond is void, because the defendant was legally in custody for want of bail, and ought to have been kept in custody.

Vide 1 Wils. 81. 1 Salk 122. 1 Rol. 406.

1 Brownl. 104.

1 Lev. 196. Sid. 301. 2 Keb 108, 109, 300.

3. BEATS *v.* SIMPSON.

[In C. B.]

Virtute cujus is not traversable.

Lutw. 632.

THE case was, *ss.* Two *habeas corpora* were pleaded, and both of different *teste and returns*, the other side replied that he was brought up *virtute* of the first writ *absq. hoc*, that he was brought up *virtute* of the other writ; and *per Treby*, Ch. Just. a *virtute cujus* is never traversable, because it is not a positive allegation, but only a deduction or inference from another matter. So is a *prætextu cujus*, and *vigore cujus*, and *per quod*, &c. for these things. *Nec augent nec diminuunt sed confirmant tantum. Powell*, Justice, agreed that *virtute cujus* was in many places no more than a bare inference; but sometimes, when it took in matter of fact, then it signified something by way of

1 Salk. 123.

allegation, *whereupon*, &c. and then it is traversable, and it may so happen that nothing else is traversable.

Suppose *two writs* are taken out against *W. R.* of the same *teste*, but of different returns, and at the different suits of *A.* and *B.*, and afterwards *A.* procures a warrant by which *W. R.* is arrested, and he gives a bail-bond, and in an action of debt brought on this bond, the condition whereof was for the defendant to appear *die*, &c. he (the defendant) pleads the statute, and that he was then in the custody of the sheriff, by virtue of a writ returnable on another day; the plaintiff may reply, that he was in custody, &c. by virtue of a writ returnable, as in the condition of the bond, *& non virtute brevis prædict. in placito defendentis mentionat.; quod fuit concessum per Nevill & Blencow, Justices: Quære tamen*, for this is contrary to *Greenvill's* case, and against the opinion of *Hale*, Ch. Just.

4. ANONYMOUS.

[Pasch. 9 Will. 3. B. R.]

Where a matter is confessed and avoided, it need not be traversed. Comyns, Pleader, B. 3.

WHERE a matter is *confessed and avoided* it need not be *traversed*. In replevin the defendant avowed, for that *W. R.* was seised and made a lease to him (the defendant) for one year, and so justified the taking, &c. *damage-feasant*. The plaintiff replied, that true it is, that *W. R.* was seised, &c., but before he made a lease to the defendant he made another to the plaintiff, which is still in being, and not determined; this is sufficient without a traverse, because the title of the defendant is confessed and avoided; but if the plaintiff had traversed the lease of the defendant, it would have been good upon a general demurrer, being only in the nature of a double plea; but upon a special demurrer it had been naught.

Cro. Eliz. 671. 2 Cro. 86. Hob. 321.

Cro. Car. 265. 266, 336. Inducement to a traverse ought to contain a sufficient title.

5. That the inducement to a traverse ought always to contain sufficient title, but it is not material whether the matter is true or false: Now the reason why the *inducement* should contain a title, is because a man ought not to deny the title of another, without shewing colourable title in himself; for if the title traversed be found to be ill, and no colour of right or title appears for him that traversed that title, then no judgment could be given.

Inducement to a traverse cannot be traversed. Cro. Car. 442. Lut. 1630. Lut. 111. Hard. 69.

But the *inducement* to a traverse can never be traversed, because that would be a *traverse after a traverse*, which would be not only infinite but absurd, because it would be to quit his own title, and fall upon the title of another.

6. GROENVELT v. BURWELL & AL.

[Trin. 12 Will. 3. B. R. 1 Ld. Raym. 213, 454. S. C. Comyns 76. S. C.]

Ante 265. * 1 Salk. 141, 200, 263, 396. S. C. Where the legality of a warrant was put in issue, it is ill. Vide 2 Bl. Rep. 776 1 Saund. 23.

THERE are some short notes of a case between these parties, but upon other points, in * 1 *Salk.*, but the case was thus: *ss.* In trespass and false imprisonment for an assault, beating, wounding, and imprisoning him; the defendant as to the beating and wounding, pleaded not guilty, *Et quoad residuum transgression.*, *&c.* he set forth a power in the *College of Physicians in London* to examine and commit for ill practice in physic, and that they adjudged the plaintiff guilty *de mala proxi*, *&c.*, and so they made a warrant to the defendant to arrest him and to carry him to *Newgate*, by virtue of which warrant they did arrest the plaintiff, *&c.* *Quæ est eadem resid.*, *&c.* The plaintiff *protestando* against the power, for plea said, that the defendant arrested him *de injuria sua propria*, *& non virtute warranti pred.;* and upon demurrer to this replication it was adjudged ill, for the traverse doth not deny that there was such a *warrant*, but the legality of it, and that the plaintiff was not taken by virtue thereof, which implies, that he might be taken for some other cause, and if that was his case, then he should have pleaded it specially, and shew for what cause he was taken: Now by this replication it may be intended, that the warrant was after the arrest, and that there was no such warrant, therefore he should have traversed *absque hoc*, that there was a warrant, or *absque hoc*, that it issued before the arrest, and then a matter of fact (from whence a question in law might arise) would have been put in issue, and not the legality of the warrant, which is matter of law.

21 H. 6. fo. 5. B.

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7. RADBORNE v. KENNADALE.

[Mich. 4 Jac. 2. Rot. 640.]

In trespass & in an avowry, if a freehold is pleaded, it must be traversed. Cro. Car. 324. Carth. 164, 165.

IN *replevin*, the defendant made conusance as bailiff to Sir *A. B.*, setting forth, that he was *seised in fee* of the *place where*, *&c.*, and so justifies the taking the cattle *damage-feasant.* The plaintiff in his replication confesses the seisin of Sir *A. B.* the son, but pleads. that his father was *seised*, *&c. in fee*, and made a lease to *W. R.* for three lives of the *place where*, *&c.;* that *W. R.* was dead, and that *W. W.* entered as occupant, and made a lease to the plaintiff; and upon a demurrer to this replication in bar, for that the plaintiff had not traversed *the seisin in fee of the son*,

it was held *per Curiam*, relying upon the case in ***Bulstrode*, that either in *trespass* or in *avowry*, if a freehold is pleaded, it must be traversed, unless the party doth wholly † confess and avoid it by a defeasible title, only with this difference, that if in an action of trespass a freehold is pleaded, the party may traverse it generally, without inducing his traverse by a *title*, but in ‡*avowry* the traverse must be induced by setting forth a *title*. *Et per Curiam*, The want of a *traverse* is matter of substance in the principal case, because there are *two affirmatives* in the pleading, and that will not admit any trial without a *traverse*, therefore it is not helped by a general demurrer, but a superfluous traverse is only matter of form, because it doth the other party no injury.

* 1 Bulst. 48. Sid. 227.

† Dyer 171, 312. 3 Cro. 650. Sid. 227. Jon. 402. Yelv. 140.

‡ Owen 51. 1 Leon. 44. denied. 1 Roll. Rep. 204.

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8. NEWDIGATE *v.* SELWIN.

[Pasch. 2 Will. 3. B. R.]

Where a traverse is good, because pursuant to the plea.

IN *covenant* for not keeping and employing his *apprentice;* the defendant pleaded, that from such a time to such a time he did keep and employ the said apprentice, and that then he *servitium ipsius* (the defendant) *deseruit & reliquit & ab eo decessit & ulterius in servitio suo remanere neglexit & abinde postea hucusq. ad loca incognita sese elongavit & absentavit;* the plaintiff replied and traversed, *absque hoc quod servitium* (the defendant) *deseruit vel reliquit vel ab eo decessit, vel in servitio suo remanere* (omitting *neglexit*) *vel sese elongavit;* and, upon a demurrer to this replication, it was objected, that the traverse was multifarious, consisting in so many particulars in the disjunctive, and that by omitting the word *neglexit*, it was not sense. *Sed per Curiam*, The traverse is good, for it is pursuant to the defendant's plea, which may be traversed, as he hath pleaded it; and that part of it, which is nonsense, will not hurt, because the traverse is good without it.

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9. HELLIOT *v.* SELBY.

[Trin. 2 Annæ. 2 Ld. Raym. 902. S. C.]

§ 2 Salk. 701.

What is not traversable.

THIS case is reported in § 2 *Salk.*, but upon another point: *ss.* In *replevin*, the defendant avowed *damage-feasant;* the plaintiff replied, that *W. R.* was *rite & legitime seised* of the manor of *H.*, and being so *seised*, did grant a copyhold messuage to him 12 *Julii*, in such a year, and that he had common in the place where, *&c.*, for himself and tenants, *&c.* The defendant rejoins and traverses, that *W. R.* was *rite & legitime* seised in fee, and granted

Com. Pleader, C. 15. Str. 818.

the copyhold messuage to the plaintiff *on the* 12*th of July &c.*; and upon a demurrer to this *rejoinder* it was adjudged ill; for, *per Curiam*, the *rite & legitime* is not traversable, nor the day of the grant; for if the lord of the manor was a disseisor, it is as to this purpose the same thing as if he was lawfully seised; and the day of granting it is not material, for a grant at one day is a grant at any day.

Co. Lit. 58, b.

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Dyer 365. contra.

10. LONGFORD v. WEBBER.

[Hill. 2 & 3 Jac. 2. Rot. 965.]

Where a justification upon a possession is not good.

Lut. 1140, 1232, 1492. 4 Mod. 419. Carth. 10. Vide 2 Mod. 70. 3 Mod. 132.

IN *trespass*, the defendant pleaded, that he was *lawfully possessed* of such a close, and so justified the taking the cattle *damage-feasant* in his close; and, upon a demurrer to this plea, the plaintiff had judgment; for though it was insisted, that there was the same reason for justifying upon a *possession* that there was for maintaining an action upon a *bare possession*; yet the Court held that there never was such a *traverse* as *absq. hoc quod possessionatus fuit*, for a possession cannot be but by contract, but a *seisin* may be by *right or wrong*; and he who hath *seisin*, hath by law a good title against all men but the disseisee, for he may maintain an assize.

2 Salk. 643.

11. HORN v. LEWIN.

[Hill. 12 Will. 3. B. R. 1 Ld. Raym. 639. S. C.]

Ante 273, 341. 2 Salk. 583. Where a traverse is ill, where not.

IN *replevin*, the defendant avowed for a rent-charge in arrear; the plaintiff replied, *de injuria sua propria absq. hoc*, that the rent was in arrear; and upon a special demurrer, for that this replication and traverse amounted to no more than the general issue; and *per Curiam*, this is not a proper inducement to the traverse, as if in trespass a man should plead *de injuria sua propria absq. hoc quod est culpabilis*, so *de injuria sua propria* **absq. hoc quod* he is bailiff, and *de injuria sua propria absq. hoc*, that there was such a prescription, these are naught, the natural and proper plea to this *avowry* had been *nihil in aretro*, which is *quasi* the general issue, so that this is a pleading special matter, which amounts to the general issue; and no other evidence can be given but such as might have been given upon the proper issue; therefore this circumlocution is ill, because it prolongs the cause by enforcing the avowant to an unnecessary replication; and though it is no more than matter of form, because it doth not alter the evidence; yet, *per Holt*, Ch. Just. this *being upon a special* demurrer, is naught.

Ante 274.

* 1 Roll. Rep. 46. Post. 357. Rast. Ent. 557, 538, 630.

12. ANONYMOUS.

[Pasch. 9 Will. 3.]

PER Holt, Ch. Just. A man ought to *induce* his traverse, and the reason is, because he ought not to deny the title of another, till he shew some colourable title in himself, for if the title traversed be found naught, and no colour or right appears for him who traversed, it would happen that no judgment could be given; but an inducement cannot be traversed, because that would be a traverse after a traverse, which would be not only infinite, but absurd; for it is quitting his own pretence of title, and falling upon the title of another.

There must be a colourable title set forth in an inducement to a traverse. Ante 353.

13. In *trespass* for taking and carrying away his goods 1 *die Januarii*, the defendant justifies the taking 2 *die Januarii, quæ est eadem transgressio;* adjudged naught upon a demurrer, because he doth not traverse the time before and after; and to say *quæ est eadem, &c.* is not sufficient, because that is not traversable.

1 Vent. 184. 2 Jon. 146. 1 Lev. 241. 3 Lev. 227. 1 Saund. 14. 1 Cro. 228. Lut. 145. 2 Salk. 642. Where the time must be traversed before and after the trespass.

14. In *trespass* laid to be done 1 *August*, the defendant justifies for right of common after the corn is cut, and that after it was cut he put in his cattle, *absq. hoc quod est culpabilis aliter vel alio modo;* and upon a demurrer to this plea it was adjudged ill, because it did not answer the trespass done, 1 *Aug.*, having no reference to that time.

Where the traverse doth not answer the time. 3 Cro. 433, 434. Lutw. 1457. 1 Saund. 312. 2 Saund. 295.

15. In *false imprisonment*, &c. the defendant justified under a *latitat*, and a warrant thereon, *virtute cujus* he arrested the plaintiff at *H.* &c. *Absque hoc quod est culpabilis aliter vel alio modo;* the plaintiff replied, *de injuria sua propria absq. tali causa;* it is true, upon a demurrer, this replication was held ill, because there was matter of record, (*viz.*) a *latitat*, and matter of fact, (*viz.*) an arrest, set forth in the plea, which the plaintiff ought to have answered in a particular manner, and not generally, by saying *absq. tali causa.*

3 Lev. 69.

16. In trespass for breaking and entering his close, the defendant justified by a prescription to dig for coals; the plaintiff replied, *de injuria sua propria absq. tali causa*, but did not traverse the *prescription* in a particular manner; and upon a demurrer to this replication it was objected, that the plaintiff ought to have traversed thus (*viz.*) *absq. hoc*, that the defendant, and all those whose estate he had in the premises, have, time out of mind, used to enter into the close, &c. and to dig there for coals.

2 Lutw. 1347, 1350. Kilburn v. Valence. Ante 356

Ante 356, 274. 3 Lev. 49, 65. Hob. 76.

TREASON.

1. THE KING v. SPEKE.

[Mich. 1 Will. 3. B. R.]

2 Salk. 630. Cumber. 144. Judgment in high treason reversed, because the Court did not demand of the defendant what he had to say.

WRIT of error to reverse an attainder of high treason, the error assigned was, that upon *oyer* of the indictment, the defendant *Speke* confessed it, and thereupon judgment was given, but without demanding of him, *what he had to say for himself, why judgment should not be given:* And *per Curiam*, this is erroneous, for it is a necessary question, because he may have a pardon to plead, or may move in arrest of judgment, for which reason the attainder was reversed.

Before the statute 25 Ed. 3. treason was an incertain crime.

2. *At common law*, before the statute 25 *Ed.* 3., treason was a very incertain crime; for killing the king's messenger was treason; so likewise where a man grew popular, this was construed to be incroaching royal power, and held to be treason; so that by the excess of these times, any crime, by aggravating the circumstances thereof, was heightened into treason.

3. Therefore this statute was made to determine what should be treason; and since it was made, there can be no constructive treason, (*i. e.*) nothing can be construed to be treason, which is not literally specified in that statute; therefore counterfeiting the *coin* is treason within the letter of this act, but *washing it* is not, nor *filing*, nor *clipping*, though within the same mischief and effect, for this statute must not be construed by equity, because it is a declarative law, and one declaration ought not to be a declaration of another; besides, it was made to secure the subject in his life, liberty and estate, which, by admitting constructions to be made of it, might destroy all.

1 Vent. 349. Treason done beyond sea may be tried in Middlesex. Co. Lit. 261.

4. The defendant was indicted for high treason in raising a rebellion in *Carolina* in *America*, and tried at bar in *Westminster-hall* and acquitted; and it was held, that this trial was good by virtue of the statute 25 *H.* 8. *cap* 2., by which it is enacted, that *foreign treasons* may be tried by a special commission, or by the Court of King's Bench, by a jury of *Middlesex*, that being the county in which that Court sits.

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TRESPASS.

1. LAMBERT v. THURSTON.

[Pasch. 2 Will. 3. B. R.]

TRESPASS for breaking his close *vi et armis et damnum* 20*s*., and upon a demurrer to this declaration, it was objected, that the damages being laid to be under 40*s*. the suit ought to have been in the *county-court: Sed per Curiam*, The trespass is alleged to be done *vi et armis*, and for that reason the *county-court* cannot hold plea of it, for they cannot fine, being no court of record, and it is at the plaintiff's election to declare *vi et armis, or not.*

Cart. 108.
3 Mod. 275.
Trespass vi & armis cannot be tried in the county court.
43 Ed. 3. 21. b.
2 Inst. 311.
F. N. B. 47.
1 Mod. 215.

2. BROOK v. BISHOP.

[Hill. 1 Annæ, B. R. 2 Ld. Raym. 823. S. C.]

TRESPASS, *Quare vi et armis 2 die Aprilis*, the defendant *clausum* (of the plaintiff) *fregit et intravit et herbam suam pedibus ambulando conculcavit et consumpsit*, and also for cutting down his underwood and trees, *transgressiones pred. a prædicto secundo die Aprilis usq.* 28 *ejusdem mensis diversis diebus et vicibus continuando.* Upon not guilty pleaded, the plaintiff had a verdict and entire damages; it was moved in arrest of judgment, that the *cutting the trees did not lie in continuance. Et per Holt*, Ch. Just. That is very true, but then the *continuando* is void as to that trespass, and damages shall be intended to be given by the jury for those trespasses of which there might be a *continuance*; but then it was objected, that the plaintiff at the trial gave evidence of the defendant's cutting *trees and underwood* at several times, which, *per Curiam*, could not be upon this declaration, at least it ought not to have been, and therefore shall not be intended: But the way to declare for such trespasses which lie [*not*] in *continuance*, and if the plaintiff would give evidence of several trespasses, is for him to set forth in his declaration, that the defendant, *between such a day and such a day, cut several trees*, and not to lay a *continuando transgressiones from such a day to such a day;* and upon such a declaration he may give in evidence a cutting on

2 Salk. 639.
Trespass with a continuando, not good. Skin. 42.
5 Mod. 178.
6 Mod. 38, 39.
7 Mod. 152.
2 Jon. 294.
2 Lev. 230.
3 Lev. 93, 94.
Cumb. 426, 427, 377. 1 Show. 296, 462.
Sid. 224, 379.
2 Salk. 639.

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*21 H. 6. 43. 1 Lev. 210.

any day within those days, so is the *Year-book* * 21 *H.* 6. In trespass, for that the defendant, between such a day and such a day, *per diversas vices* took and carried away so much corn, *quod nota* for the right way of declaring: *Et per Powell*, Justice, the practice was to give in evidence several trespasses upon the way of declaring, as in this case, but that it was wrong; and if the plaintiff had done so at the trial, as it was alleged, he ought not to have judgment.

3. GIPPS *v.* WOLLESCOT.

[Trin. 7 Will. 3. B. R. Rot. 301.]

Trespass for fishing and taking salmones, and did not say suos, not good. Ante, p. 291. Skin. 677. Cumb. 433, 458, 464. Carth. 285. 2 Salk. 637, 656.

TRESPASS against the defendant, for that he in *separali piscaria & in libera piscaria sua apud H. piscavit*, and did take and carry away 500 *salmons*. *Per Holt*, Ch. Just. a man may have a free fishery in his own soil; as for instance, suppose he hath a river within his manor, and another hath a right of fishing with him; but because it was not said *salmones suos*, nor *ibidem cepit*, the defendant had judgment. The same point was adjudged *Pasch.* 5 *Will.* 3. between *Smith and Kemp*.

Sid. 239.

4. *Per Curiam*, In trespass the defendant may plead a *title;* but if an action of trespass be brought for the *mesne profits*, after a recovery in ejectment the defendant can neither plead a title or give it in evidence (*a*).

1 Vent. 329. Trespass with a continuando, not good. 1 Lev. 210. 2 Jon. 109. 2 Lev. 230. Cro. Jac. 435, 665. 1 Show. 196.

5. In *trespass*, for *fishing* in his several fishery, and for taking *twenty bushels of oysters*, *continuando piscationem prædict.*, from such a day to the time of the action brought: Upon not guilty pleaded, the plaintiff had a verdict, but could never get judgment upon the authority of *Playter's* case, because the fishing mentioned under the *continuando* was uncertain, not expressing the quantity or quality of the fish; it is true, *Hale*, Chief Justice, said, that they were more strict formerly in the certainty of pleading than now, for now an *indebitatus assumpsit* for goods sold is held well, without any further certainty.

2 Saund. 401. 1 Vent. 221. 2 Salk. 643. Where the defendant pleads a possession, but did not set forth a title, not good.

6. *In trespass* for breaking his close and eating his grass with cattle; the defendant pleaded, that at the time of the trespass, &c. he was *possessed of all the corn growing on four acres of land* parcel of the *locus in quo*, as of his proper goods, by reason whereof, at the time in which the trespass was supposed to be done, he entered with his cattle to mow, take, and carry away the corn, and in entering, the said cattle did the trespass, *sparsim & raptim*, and so justifies the trespass precisely; and upon demurrer

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(*a*) *Vide* note to the title *Ejectment*, 1 *Salk.* 260.

this plea was adjudged ill, because the defendant did not set forth any *title* which he had to the corn, but only that he was *possessed* thereof, which is not sufficient without a title, because the property shall be intended to be in the owner of the soil.

TRIAL AND NEW TRIAL.

1. KING v. ALBERTON.

[Mich. 10 Will. 3. B. R.]

Where a new trial shall not be granted.

A MOTION was made for a new trial, because the defendant having pleaded a composition with his creditors, had forgot to carry down witnesses at the trial to prove the subscribers' hands. *Sed per Curiam* it was denied, because the plaintiff sued for an honest debt; and *Holt*, Ch. Just. remembered the case of an action of debt brought against *an heir*, who pleaded *riens per descent*, upon which they were at issue, and there was a verdict against the *heir*, because he had not brought the settlement with him, by which he was seised of an *estate-tail*, and for this reason he moved for a new trial; but it was denied, because the plaintiff had recovered an honest debt.

Vide 2 Salk 647. pl. 16.

2. ANONYMOUS.

Where the trial shall be per medietatem linguæ, where not.

IN *covenant*, after a verdict for the plaintiff, the defendant moved for a new trial, suggesting that he was an *alien*, and that the sheriff had returned *twelve of the jury*, but that there was not an *alien* amongst them. *Et per Curiam*, The defendant shall never have a trial *per medietatem linguæ*, without prayer, and if it is granted, and the sheriff returns none but *denizens*, the defendant ought to challenge them before the trial; and if the challenge is not allowed, then to insist on a bill of exceptions; but the suggestion now made by this defendant is against the record; and if it is true, he may have an action against the sheriff for a false return.

Dyer 28, 145. 2 Rol. Abr. 643. Cro. Eliz. 869. 2 Hal. Hist.P.C. 272. 3 Bac. Abr. 263.

Note; If an *alien* is sued as executor he shall not have a trial *per medietatem linguæ*, because in such case he is sued, *in auter droit.**

Cro. Eliz. 8, 9. Cro. Car. 275, 683. Carter 192. Ante 28.

* Otherwise if his intestate had been an alien.

3. SIR CH. BERRINGTON'S *CASE* & AL.

[Mich. 5 Annæ, B. R.]

Trespass against several defendants, the plaintiff had a verdict, but as to one of them it was against evidence, no new trial was granted. Vide 12 Mod. 275. Str. 814.

IN trespass and false imprisonment against several defendants, the plaintiff had a verdict; and afterwards it was moved for a new trial, because as to one of the defendants the verdict was against evidence. *Sed per Curiam*, This cannot be done, for the Court cannot set aside the verdict as to some, and not as to others, and to grant a new trial as to all would be a prejudice to those who are duly acquitted.

4. ANONYMOUS.

No new trial on an indictment for perjury. Sid. 153. 1 Lev. 124. 2 Salk. 646. 2 Jon. 163.

THE *attorney-general* moved for a new trial at bar for the king, upon an *indictment for perjury*, but it was denied, because the king is not interested in the indictment, otherwise than in point of *common justice.*

5. ANONYMOUS.

[Pasch. 1702. B. R.]

Of carrying down a cause by proviso.

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6 Mod. 246.

RULED, that if the plaintiff would not enter his issue, or if it is entered, and he will not carry down the cause to trial, the defendant may by rule compel him to enter it, and if it is entered, the defendant may carry it down by *proviso*; and that this is the standing rule of the Court; and in this case Serjeant *Darnel* moved, that the plaintiff's evidence depending on certain town-books in the custody of the defendant, and that he having refused to give copies thereof, *&c.*, that the plaintiff might not be compelled to proceed till the defendant gave him copies, but it was denied; for, *per Holt*, Ch. Just. the defendant is not bound to help the plaintiff to evidence against himself.

The defendant not bound to help the plaintiff to evidence.

6. REGULA.

[Hill. 16 Car. 2. B. R.]

Rule.

ORDINATUM est, quod nisi causæ triandæ apud London & Middlesex intratæ fuerint cum capitali justiciario hujus Curiæ per spatium duarum dierum ante sessionem qua triandæ sunt, marescallus potest intrare ne recipiatur ad instantiam defendentis vel ejus attornati, &c.

7. HALL *v.* HILL.

[Mich. 1 Annæ.]

IN an action brought in an *inferior court*, (*viz.*) in the court at *Bristol*, the plaintiff had a verdict and costs taxed; and after a second *scire facias* against the bail, the judge of that court granted a new trial, and thereupon the Court of *B. R.* being moved, made a rule for the judge of the inferior court to shew cause why an attachment should not be granted against him: for, *per Curiam*, though a new trial ought to be allowed, if freshly pursued, yet it is a misdemeanor in a judge to grant a new trial after the party hath rested so long under a former trial, and it may be a question whether any court can grant a new trial to be had before themselves: There cannot be a new trial at bar as there may be at *nisi prius*, for in the last case it is but reasonable that the Court shall judge how the judge of *nisi prius* has executed his authority.

Judges of an inferior court granted a new trial after a second scire facias was brought against the bail. Vide 1 Salk. 201. 2 Salk. 650. S. C. 7 Mod. 84, 85.

8. *Covenant* was brought by the plaintiff in *Hampshire*, for not *repairing* a house in *Berkshire;* and issue being joined upon *non infregit conventionem*, the cause was tried in *Hampshire*, and the plaintiff had a verdict, but could never get judgment; for *per Curiam*, this is a mis-trial, because this being a special issue, nothing can be given in evidence but the not repairing in *Berkshire*, especially since the suit is between the very parties to the deed, and not between assignees (*a*).

Sid. 157. Of a mis-trial in an improper county. Ray. 85. 1 Lev. 114. 3 Lev. 394. Ante 107. Post. 364. Cumb. 472. 1 Saund. 247.

9. Debt upon bond, the action was laid in *London*, and the condition was, for performance of covenants in an indenture, by which a *walk*, called *Shrubwalk*, in the county of *Northampton*, was granted, *&c.*, and the *venue* was of *Shrubwalk*, and the cause was tried in *Northampton;* and after a verdict for the plaintiff it was insisted, that here was a *mis-trial*, because the *venire facias* could not come from a *walk in a forest*, which is only an office or liberty: *Sed per Curiam*, This being tried by a *jury* where the matter in issue did arise, it is within the statute 16 & 17 *Car.* 2. *cap.* 8.; it is true the words of that statute are, (*viz.*) *It shall be good, if tried by the county where the action is laid*, but that must be understood *by the county where the matter in issue doth arise;* for otherwise it would destroy the whole law concerning juries, to try it in a county foreign to the issue, as it may, if tried in the county where the action is laid.

Sid. 325. 1 Lev. 208. Trial good, if by the county where the matter in issue doth arise. Postea 11. S. P.

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(*a*) It is held 2 *Cro.* 142. *Noy* 142., that an action of covenant for not repairing may be in the county where the lease is alleged. The special reason of this case seems founded on a proposition directly contrary to law. *Vide* 2 *Salk.* 651.

Sid. 157.
1 Lev. 114.
Where the plaintiff may lay his action in what county he will.

10. The plaintiff was *apprentice* to the defendant, who covenanted to instruct him in such a trade; and for not performing it an action of covenant was brought and laid in *Middlesex*; the defendant pleaded a departure out of his service in *London*; and, upon a demurrer to this plea, it was insisted for the defendant, that the *venue* ought to be from *London*, where the departure was, and the rather, because the cause of action in *Middlesex* was admitted by the demurrer. *Sed per Curiam*, In personal actions, and in such which are transitory, the plaintiff may lay his action in what county he will, and the jury ought to find all local acts, though in another county.

Antea 9. S. P.
3 Lev. 394.
2 Jon. 82.
2 Show. 344.
1 Saund. 247.
Carth. 448.

11. *Covenant*, and the action was laid in *London*, and issue was joined upon a feoffment in *Oxfordshire*, of lands in that county, and the cause was tried in *London*; after a verdict for the plaintiff it was moved in arrest of judgment, that this was a *mis-trial*, because a feoffment of lands in *Oxfordshire* is local, and therefore the cause ought to have been there. *Sed per Curiam*, This is helped by the statute 17 *Car.* 2., being tried in the county where the action was brought.

5 Mod. 405.
Cumb 472.
2 Show. 344.
Carth. 448
Where a wrong venue is aided by the statute.

12. Covenant for not repairing a house in *Chester*, the defendant pleaded *reparavit*, upon which they were at issue, and the *venire facias* was from the *county of Chester* at large; after a verdict for the plaintiff, it was objected, this was a *mis-trial*, for the issue being local, (*viz.*) at *Chester* generally, and the trial being in the county of *Chester* at large, it was by a jury of a wrong county: And *per Curiam*, this is not aided by any statute, but only a wrong *venue in a proper county*, as if the issue is at *Islington in Middlesex*, and the *venue* is of *Hampstead in the same county*, that is right, but the *venue* is wrong, and that is aided.

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TROVER.

1 Salk. 219.
2 Saund. 74.
2 Vent. 67, 78.
2 Cro. 664.
1 Sid. 445.
2 Sid. 174.

1. IN *trover*, the plaintiff declared for *ten pair of curtains and vallance*, good without shewing the kind and *quantum* of stuff, and so it is of any such artificial things.

1 Cro. 89.
Alleyn 91.
1 Salk. 219.

2. It lies *de denariis*, though out of a *bag*, for the action is not to recover the money, but the damages.

Cro. Car. 544.
3 Lev. 336, 337, 545. 2 Cro. 262. 1 Bul. 95.

3. It lies for a *spaniel*, but not for a hawk unless reclaimed, and the reason is for want of *property*, and there-

fore the plaintiff always proves a property in himself and a conversion by the defendant.

4. *Trover* for a horse, the defendants justify the taking as a *distress* for toll; naught upon a demurrer, because the conversion is not answered, for a distress is no conversion. 2 Salk. 654. 6 Mod. 212.

Hutt. 10. Hob. 187. S. C. Quod vid. 10 Rep. 46. Vide Jon. 240.

5. Trover, *&c.* for 100 *sheep*, the defendant justified under a *fieri facias*, by virtue whereof he took them in execution: *Et per Curiam*, upon demurrer this was adjudged ill, because this plea doth not answer the *conversion*, he should have plead not guilty, and given this matter in evidence at the trial.

6. *Trover* against husband and wife, the plaintiff cannot declare of a conversion by the husband and wife, to the use of the wife, or to the use of the husband and wife. 1 Roll. 6, 348. Vide 1 Salk. 114.

Cro. Eliz. 494. March 60, 82. 2 Cro. 661. Jon. 16, 264, 413.

7. But he may declare of a conversion by the husband and wife, to the use of the husband, or that the wife converted the goods to the use of a stranger, but not to her own use, or that she converted them to the use of her and her husband.

1 Roll 6. Yelv. 165. cont. 1 Brownl. 3. Jon. 264, 443.

8. Where the defendant comes to the possession by finding, in such case denial is a conversion; but if he had the goods by delivery, there denial is no conversion, but evidence of a conversion; now in both these cases the defendant had a lawful possession, (*viz.*) either by finding or by delivery, and where the possession is lawful, the plaintiff must shew a demand and a refusal, to make a conversion.

Sid. 264. Chut. 112. 6 Mod. 212.

2 Salk. 655. 6 Mod. 212. 2 H. Black. C.B. 136.

But if the possession was tortious, as if the defendant takes away the plaintiff's hat, there the very taking is a sufficient proof of the conversion (*a*).

(*a*) *R. acc.* 3 *Wils.* 146. 5 *Bur.* 2657. *Vide* 2 *Str.* 943.

9. FULLER *v.* SMITH. [366]

[Mich. 8 Will. 3. B. R.]

IN trover, the plaintiff declared of a finding by ten persons, and that nine of them *converted* the goods; upon not guilty pleaded, the plaintiff had a verdict and judgment in *C. B.*, but upon a writ of error in *B. R.* the judgment was reversed, because the conversion is the *gist* of the action, for if a man finds goods, it is lawful for him to take them up.

Conversion is the gist of the action.

10. BENBRIGG v. DAY.

[Hill. 3 Will. 3. B. R.]

1 Salk. 218. Where the plaintiff may take several damages, and release them as to one thing which is incertain.

TROVER for several things, and amongst the rest *pro duobus falcris*, and upon a demurrer to the declaration, for that *falcris* was an insensible word; *Holt*, Ch. Just. would not abate the declaration; because he said that the plaintiff might take several damages as to the other things, and might release them as to this word, and so take judgment for the rest.

11. HARTFORD v. JONES.

[Mich. 10 Will. 3. B. R. 1 Ld. Raym. 393. S. C.]

2 Salk. 654. S. C. Upon another point. What plea is good in trover, what not.

IN trover and conversion, the defendant may plead *not guilty*, and give in evidence, that he distrained the goods, and detained them till he was paid, but he cannot plead specially, that he *took the goods by distress*, or that he *detained* them as host till paid for the horses standing, *& sic de similibus*, for the conversion is lawful, and none is confessed; but if he pleads a matter which confesses a conversion, and avoids it, as the case is in † *Yelverton;* it is good *per Holt*, Ch. Just., and so it was adjudged in this case.

† Yelv. 198.

1 Vent. 211 3 Keb. 14.

12. Trover *de duobus centenis plumbis uræ*, *Anglice*, two hundred ton of lead *ore*, it was objected, that *centena* was properly a hundred in a county: *Sed per Curiam*, it is good, as here with *Anglice*, so it is *de duobus ponderibus casei*, *Anglice*, *two weighs of cheese;* so it is *de duobus oneribus cupri*, *Anglice*, *two horse-loads of copper*, for these words are to be understood according to the subject matter.

2 Saund. 74. Stile 360, 361

13. In *trover*, the plaintiff declared for *ten pair of curtains and vallance*, good, without shewing the kind and *quantum* of the stuff, and so it is of such artificial things; but trover for *planks*, unless the plaintiff sets forth how many, is not good; but for planks in his granary, or for books in his study, is good.

Sid. 98. 2 Vent. 78. 1 Show. 144.

Hardr. 111.

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* 14. In trover for *letters patents* of wine-license, after a verdict for the plaintiff, it was objected, that letters patents are a record, and there cannot be a conversion of a record. *Sed per Curiam*, the letters patents in the declaration are only an *exemplification* of those under the great seal, for which trover lies, and they may be converted (*a*).

(*a*) *Per* Ld. *Mansfield*, in the case of *Cowper* v. *Chitty*, 1 *Bur*. 31., The action of trover in form is a fiction; in substance, a remedy to recover the

value of personal chattels wrongfully converted by another to his use. The form supposes the defendant *may* have lawfully come by the possession of the goods. The action lies, and in many cases has been brought, where, in truth, the defendant has got the possession *lawfully*. Where the defendant takes them wrongfully and by trespass, the plaintiff, if he thinks fit to bring *this* action, waives the trespass, and admits the possession to have been *lawfully* gotten. Hence, if the defendant delivers the thing upon demand, no damages can be recovered in *this* action for having taken it. This is an action of *tort*, and the whole *tort* lies in the *wrongful conversion*.

Two things are necessary to be proved to entitle the plaintiff to recover in this kind of action: 1st, Property in the plaintiff. 2dly, A wrongful conversion by the defendant.

TRUST.

1. THE father sold the ancient estate of the family, and with the money purchased a new estate in his and his son's name; the father devised the lands to his grandson, and died; the devisee pretending, that the eldest son, who joined in the purchase with his father, was only a trustee. *Sed per Curiam*, Where the purchase is to the father and son, he shall never be taken to be a mere trustee, unless so expressly declared, but it shall be intended as an advancement of the son, especially if he is not otherwise advanced, or left unprovided; and it was the ancient way to join the son in all purchases to prevent wardship.

Ch. Rep. 25. 2 Ch. Rep. 231. Where the son is joined with the father in a purchase it shall be intended for his advancement. Ca. Ch. 296. 2 Vern. 19.

2. Where a trustee is to pay debts, legacies or portions, out of the *annual rents*, *issues*, and *profits of the estate*, he cannot alien or sell to raise the money, unless it is to be paid at a certain and prefixed time; and if the annual profits will not do it within that time, then he may sell, for it is within the intention of the trust.

Ibidem. Where money is to be paid out of the profits, &c. the lands cannot be sold.

3. The testatrix made *W. R.* her executor, and gave all her estates real and personal for the payment of her debts and legacies, and amongst other legacies she gave 200 *l.* to her uncle, who was her heir at law; *per Curiam*, this is a devise of the lands to *W. R.* in fee, and no implied trust in him for the benefit of the heir, as to the surplus, after debts and legacies paid; for if that had been intended by the testatrix, then the devise of 200 *l.* to him had been to no purpose.

Devise of all her real and personal estate is a devise in fee. Ibidem 197. 2 Vern. 247. 3 P. Wms. 191. Ca. Temp. Talb. 269.

*4. The *wife* having assigned her term before marriage, the *husband* mortgaged the trust. *Et per Curiam*, Where a *term* is settled in trust for a *jointure*, or in pur-

1 Ch. Rep. 225. See 266. Where the wife assigns her term before

marriage, the husband can never charge it.

suance of *marriage articles*, or if it be the term of the wife, and assigned by her before marriage, the *husband* can neither charge, dispose, or forfeit it by outlawry, and this hath been the constant course in Chancery since *Queen Elizabeth's* reign; but if the assignment is made after marriage in trust for the wife, it is then voluntary and fraudulent.

Hard. 495. Trust of a fee-simple or tail is forfeited by treason. Vide Foster 223.

5. A trust of a fee or tail is *forfeited by treason*, but not by felony; for such forfeiture is by way of escheat, and an escheat cannot be but where there is a defect of a tenant, but here is a tenant.

VARIANCE.

Raym. 398. Variance, where it is amendable by the statute 16 & 17 Car. 2.

1. IN *ejectment* for a messuage, with the appurtenances: Upon not guilty pleaded, the plaintiff had a verdict *quoad parcellam messuagii jacen' next the messuage of F. Neev;* and the judgment was, that the plaintiff recover the term of and in parcel of a messuage lying next the messuage *in the occupation of F. Neev*, so that the verdict was for a messuage *next the messuage of F. Neev*, and the judgment was for a messuage next another messuage, *in the occupation of F. Neev;* now admitting this is a variance,it is amendable by the statute 16 & 17 *Car.* 2. *cap.* 8. (*viz.*) the words are, *All such omissions, variances, defects, and other matters, of like nature, not being against the right of the matter of the suit, shall be amended:* But a messuage *of F. Neev*, and a messuage *in the occupation of F. Neev*, seems to be no material variance.

Postea 9. S. P. Variance between the writ and declaration.

2. *In replevin* for taking *averia*, and the writ and declaration were both for taking *averia*, (*viz.*) a mare; and upon a demurrer it was objected, that a mare could not be *averia;* and for this variance between the writ and the declaration the defendant had judgment. 2 *Lutw. Ginn's case.*

Sid. 103. Between the writ of error and record certified. 1 Rol. 754. Sid. 115.

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* 3. Error to reverse a judgment in *C. B.* in ejectment, the writ was abated, for that it was to remove the proceedings between *W. R.* and *W. W.* of the city of *Excester*, in the county of the city, and a blank was left for the addition, and the record certified was, that *W. R.* of *North Moulton in the county of Devon, yeoman*, was attached to answer *W. W. clerk;* and for this variance between *W. R.*

in the writ, and *W. R. with the addition* in the record certified, it was abated.

Sid. 193. Between the writ of error and record certified.

4. Error to reverse a judgment in *C. B.* in trespass, the writ was *W. R. de, &c., in com. Warwick*, and the record certified was *W. R. de, &c., in com. Lincoln. Per Curiam*, It is a material variance, and by reason whereof the record was not removed.

Sid. 269. Between the writ of error and the record certified. 1 Rol. 753. Str. 116.

5. Writ of error in the Exchequer-chamber to remove a record out of *B. R.* of a certain trespass the husband and wife had done, and the record certified was a trespass done, by the *woman alone*, and for this variance the writ was abated.

6. BURR *v.* ATWOOD.*

[Mich. 1 Annæ]

1 Ld. Raym. 328, 553 Writ of error in which the judgment was misrecited.

THE plaintiff obtained judgment in a *scire facias* upon a recognizance against the bail, and now upon a writ of error brought, it was *quod in adjudicatione executionis judicii prædict. error intervenit manifestus, &c.;* adjudged this was naught; it should have been *in adjudicatione executionis recognitionis prædict.*,* because a *recognizance* is not such a *judgment* as might or would be intended on the face of the writ of error.

7. KING *v.* EWER.

[Pasch. 1 Annæ, B. R.]

2 Ld. Raym. 756. Where et instead of aut was recited in the scire facias.

IN a *scire facias* upon a recognizance removed by *certiorari*, and, upon *oyer* entered *in hæc verba*, the condition of the recognizance recited in the *scire facias* was, that the defendant should give notice of trial *prosecutori et ejus clerico*, whereas the recognizance itself was *prosecutori aut ejus clerico;* and *per Curiam*, this is a variance, and quite different; so the defendant had judgment.

8. ANONYMOUS.

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[Pasch. 5 Will. 3. B. R.]

Between the original and the declaration.

IN *trespass* and battery brought against husband and wife, the original, as it was recited in the declaration, was of a battery only at one time, but the declaration itself was of several batteries done by them at several times; and the defendant pleaded to the several batteries, but the plaintiff replied only as to one of them, and at the trial had a ver-

dict; and upon a motion to set it aside for this variance, *per Curiam*, the original being recited in the declaration, but not set out upon *oyer* craved (a), it shall be intended to be right, but misrecited in the top of the declaration; and the plaintiff's not replying to the other batteries is but a *discontinuance*, which is helped by a verdict.

(a) The Courts will now grant *oyer* of an original. *Vide Doug.* 227.

9. ANONYMOUS.

Antea 2. S. P.

IN *replevin*, the writ was *quare cepit averia*, and the declaration was *quare cepit unam equam*. *Et per Powell*, This variance between the writ and declaration is naught even after a verdict, which *Treby*, Chief Justice, denied: It is true it is naught upon demurrer, but it is cured by the *Oxford* act after a verdict.

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VENIRE FACIAS.

Sid. 100. Salk. 63.

1. A *VENIRE facias ad respondendum* may be without a day certain, because by an appearance the fault in this process is aided, but a *venire facias ad triand. exitum*, must be returnable on a day certain.

1 Cro. 583. Sid. 99.

2. Upon an indictment before *justices of peace in their quarter-sessions*, or before justices of *oyer* and *terminer*, there must be *fifteen days between the teste and return of the venire facias;* but if the entry be *ex assensu partium*, then the *venire facias* may be returnable *immediate* before the justices of peace, &c.

1 Cro. 448. Style 28, 29.

3. But before Justices of oyer and terminer, and *gaol-delivery*, an indictment may be found and tried the same day, for they may award a *venire facias* returnable *immediate*, and so may the King's Bench for all offences done in *Middlesex*, that being the county in which that Court sits, but not for offences done out of that county, because as to such it is not a court of *oyer*, &c.

4. Where an imperfect verdict is given in an *assize*, the same *recognizors* may be resummoned by certificate of the assize to explain that verdict, because this is *festinum remedium*, but in all other cases, where the jury come in by process judicial, if an imperfect verdict is received and

recorded, no *alias venire facias* or *nisi prius* will lie for the same jury, but there must be a *venire facias de novo;* it is true, if a jury is discharged upon a demurrer to the evidence, and without giving any verdict, there an *alias venire facias* will lie for the same jury, but where a verdict is set aside, there must be a *venire facias de novo*, because the same jury cannot stand indifferent to try the same cause again.

3Cro. 33. 8 Rep. 66. Allen 18.

5. A *venire facias de vicineto villæ, &c.* is good in a superior court, because their jurisdiction is general, but it is not so in an inferior court, because their jurisdiction is circumscribed to the vill only, therefore the *venire facias* must be *de villa*, and not *de vicineto villæ*, but this is contradicted by the later *authorities, for it shall be intended, that their liberty extended beyond the vill.

Noy 66. in Gresman's case.

*Jones 171. Latch. 208.

VERDICT.

1. IN a special verdict in *trespass*, brought against *Sir Rich. Cox, Baronet, Rich Cox, Esq.* and others; upon not guilty, the jury find a warrant of a justice of peace, commanding the constable to arrest the plaintiff *virtute cujus* he was arrested, and that the constable required the other defendants to assist him to convey the plaintiff before a justice of peace, and that they brought him to the constable's house, and that *prædict. Richardus Cox, Miles*, sent for the constable, and commanded him to put the plaintiff in the stocks, whereas there was no such person as *prædictus Richardus Cox, Miles*, before-mentioned in the record: [*But Richardus Cox, Baronett.*] *Et per Curiam*, this made the verdict very uncertain.

Vaugh. 111, 117. Uncertain verdict.

2. The jury were charged at the assizes with an issue concerning a *copy-hold*, and one of them, after they were gone from the bar, had a *court roll* [delivered to him], and told the rest, that he knew the matter, and that it was for the plaintiff, but the other eleven being of another opinion before they saw the *roll*, left the matter to this juror, and so they brought in a verdict for the plaintiff, but it was set aside, and a new trial granted.

Sid. 235. Vide Eliz. contr. Cro. Eliz. 6. 6. 2 Rol. 715. Mo. 546.

3. CATTLE & AL. v. ANDREWS.

[Hill. 5 W. 3. Rot. 826.]

Not guilty as to part, and they gave no verdict as to the rest. Vide Sho. 1089. And. 156. Cro. Eliz. 133.

1 Inst. 227.

ERROR of a judgment in *C. B.* in an action of trespass, wherein the plaintiff declared against the defendant for several trespasses, (*viz.*) for breaking and entering his close, treading down his grass, and taking and carrying away water; the defendant justifies as to all, upon which they were at issue, and the jury found him not guilty as to the *treading*, but gave no verdict as to the other matters; this was adjudged naught, and for this cause the judgment was reversed.



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4. ANONYMOUS.

[Hill. 1697, at Guildhall, *coram* Holt, Chief Justice.]

Where the defendant confesseth the action, the finding of the jury will not discharge him. 1 Salk. 23. S. C.

ASSUMPSIT against two, and there was judgment by default against one of them, the other pleaded payment in satisfaction of the whole debt, but at the trial proved only payment of his share: *Et per Holt*, Ch. Just. If the jury find a discharge only as to this defendant, they must find for the plaintiff, and so they must, though they find the payment was for the whole debt, because the other defendant hath confessed the action, and the finding of the jury cannot discharge him; which was done accordingly, and small damages given.

Jones 28, 61.

5. *Verdict* shall not be taken so strictly as pleadings, but the substance of the thing in issue ought to be always found.

Where the jury may give a general or special verdict.

6. In all cases and in all actions the jury may give a general or special verdict, as well in causes *criminal* as *civil*, and the Court ought to receive it, if pertinent to the point in issue, for if the jury doubt they may refer themselves to the Court, but are not bound so to do.

Variant from the declaration.

7. Where the action is grounded on the contract, if the party mistakes the sum, he fails in his action, as for instance, if he declare for a horse of 20*l.* and the evidence is, that the horse was sold for 10*l.* or for twenty marks, in such case the plaintiff shall not recover, because it is upon another contract.

2 Cro. 380. Cro Eliz. 147. Moor 466. Sid. 5. 2 Vent. 151, 223.

8. But it is otherwise if the plaintiff declare upon a promise in law, or where the action is grounded on a *tort*, as if an action of debt is brought for the escape of the husband and wife, and the jury find, that the wife only was in execution and escaped, the plaintiff shall have judgment.

9. Case, &c. In which the plaintiff declared, that the defendant was indebted to *W. R.* in 40*l.*, who became a bankrupt, and that the commissioners assigned *debita in quædam schedula annex. continen. præd. summam* 40 *l.* to the plaintiff, whereby the defendant became indebted to the plaintiff in 40*l.*, and being so indebted, promised to pay; and upon the evidence the jury found the defendant was indebted to the bankrupt in 30*l.* only, so that the sum of 40*l.* for which the plaintiff had declared, was never assigned to him, nor promised to be paid; but adjudged, that it was no worse in the plaintiff than if the bankrupt himself, before he became bankrupt, had brought the action; and the difference is between an action on a promise in law as in the principal case, and an action brought upon the contract itself; for in the first case, a *mistake in the sum* doth not hurt, but in the other case it doth.

Allen 28. Baker's Case.

10. A verdict, which finds *part only of the issue*, is void as to the whole; as for instance, an information was brought for intruding into one messuage, and an acre of land, and the jury found the defendant not guilty as to the land, and said nothing of the messuage; this was adjudged ill as to the whole.

Where part of the issue is only found and finding, but not pursuant to the issue. 1 Inst. 227. Cro. Eliz. 133. Vide 3 Lev. 55. 3 Leon. 83.

11. Case, &c. for saying the plaintiff had the *French pox*, and *that he was*, &c. the jury find all the words in the declaration, except those, *that he had the French pox*, adjudged ill for that reason.

Dyer 75. Allen 31

12. So where the defendant was indicted for a forcible entry and detainer, the jury found the entry peaceable, but said nothing as to the *detainer;* but if they had found the entry peaceable, and the detainer by force, it had been good.

Sid. 99.

13. But where the defendant was indicted for forging and *publishing*, and he was found guilty *de transgressione* [*prædict.*], and of the forgery aforesaid, though nothing was said of the *publishing*, yet the verdict is good, because the words *de transgressione prædict.* include it.

2 Lev. 111, 221

14. So in trespass for an assault and battery, and the jury found the defendant guilty *de transgressione*, and assault [*prædict.*], and said nothing as to the battery; adjudged good, for the word *transgressio* includes the battery.

2 Lev. 111, 221. Rex v. Norton. Cro. El. 85.

15. Action of the case for words, upon not guilty pleaded, the jury found that the defendant *non locutus est verba*, &c.; adjudged ill.

Sid. 234

16. So in *trespass*, upon not guilty pleaded, the jury found, that the plaintiff *non damnificatus fuit;* this is ill, because it doth not answer the plaintiff's charge.

17. So in *assumpsit*, and *non assumpsit* pleaded, the jury found, that the plaintiff was *damnified* 10 *l.* by the defendant's non-performing his promise; this is ill, because it

Yelv. 78, 79.

doth not directly answer the issue, but by implication.

1 Roll. Rep. 257. Baugh's Case. 2 Roll. 694.

18. So if the issue be *solvit ad diem,&c.*, and the jury find *quod debet*, it is ill.

Uncertain and imperfect, and where more or less is found. 1 Roll. Rep. 234. Evett's Case. 2 Roll. 694.

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* 19. The defendant pleaded *plene administravit*, and the jury found that he had goods in his hands, but did not find to what value; adjudged ill, because the plaintiff must recover according to the value of the assets found; but if action of debt is brought against an *heir*, and he pleads *riens per discent*, and the jury find that lands in fee descended to him, but not to what value, the verdict is good, because a general judgment shall be given, and not according to the value of the land.

Yelv. 106.

20. *Trespass* against husband and wife, in which the plaintiff *inter alia* declared, that they beat his mare. Upon not guilty pleaded, the jury found that the wife did beat the mare, and *as to the residue, &c.*, they found for the defendant; adjudged, that this was an imperfect verdict as to the *husband*, for it neither acquits or condemns him, for the finding *as to the residue* extends only to the other trespasses.

Jones 42. Blenerhassett's Case.

21. A verdict found, that *W. R.* the *copyholder* did bargain and sell to the lord of the manor all the lands which he purchased of *W. W.*, and did not find what lands, or that they were purchased of *W. W.*, and for that reason adjudged ill.

Cro. 37 Eliz. 415. Boraston's Case.

22. *In trespass*, the defendant pleaded a custom, *&c.*, which being traversed by the plaintiff, the jury found the custom specially, but variant from that which was pleaded, concluding their verdict *quod si super totam materiam, &c.*, they find the defendant guilty, *si aliter, &c.*, then they find him not guilty. *Et per Curiam*, a *venire facias de novo* was awarded, because there was no verdict found upon this issue, there being no conclusion upon the point in issue.

Noy 147. Smith v. Fowkes.

23. In a *quare impedit*, a special verdict found an instrument under the seal of the bishop with this indorsement, (*viz.*) *A resignation was acknowledged and accepted by the bishop;* adjudged, that it was not a finding a *resignation in fact*, but only evidence of a *resignation;* so if instead of finding a feoffment the jury should find there was a charter and *livery* indorsed, it is ill.

Where a verdict finds more than in issue, it is void.

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24. A verdict, which finds *more than is in issue*, is void *quoad* that, because it is not within the charge or commission of the jury; as for instance, if a man bring an action of debt, and declares for 20*l.*, and the jury, upon *nil debet* pleaded, find that the defendant owed 40*l.*, this is ill, for the plaintiff cannot recover more than he demands, and in this case he cannot recover what he demands, because the Court cannot sever their judgment from the verdict.

25. In *trespass* for taking his *gown and manteau*, a special verdict found that the defendant as constable took the gown for a *tax*, but found nothing as to the *manteau; per Curiam*, this is a *discontinuance* as to the whole.

3 Lev. 40, 55. Ante 374. 3 Cro. 133.

26. *Assault and battery* by *husband and wife*. Upon not guilty pleaded, the jury found that the defendant was guilty as to *beating the wife*, and nothing was said of the *husband*. *Et per Curiam*, This verdict is void, because only part of the issue was found.

Hard. 166.

27. In an action of debt for rent, the defendant pleaded *nil debet modo & forma prout*, as the plaintiff had declared, upon which they were at issue, and the verdict found *quod nil debet modo & forma*, as the plaintiff had declared; and upon a writ of error brought, this was assigned for error to make the whole verdict void, for the plaintiff did not declare that *nil debet modo & forma*, *&c.*, he declared *quod debet*. But *per Curiam*, the *modo & forma*, and what follows, shall be rejected, and so *nil debet* shall stand alone to make the verdict good.

Sid. 357. Vide 2 Rol. Ab. 695.

VICAR AND VICARAGE. [377]

1. AT common law the *vicar had no freehold*, and so it continued till 9 *Ed.* 3., which gave him a *juris utrum;* and therefore it hath been held, that lands might be given by the *rector to the vicar*, because the freehold still continued in the *rector;* but a stranger could not give lands to the *vicar*, because in such case he would have a *freehold*, and that would be in *mortmain*.

Vicar, where he had no freehold.

2. And as to this matter there is a remarkable case, *anno* 40 *Ed.* 3. 29, 30. *ss.* A *vicar* brought a *juris utrum* of a *carve* of lands, to try whether it was the freehold of the *vicar*, or the lay-fee of the *prior*, the defendant pleaded, that he was *parson of the vicarage*, and prayed judgment if the Court would take cognizance of this matter; and it was objected, that the vicarage being derived out of the *rectory*, and that by the act and concurrence of the ordinary; and it being a thing so far depending on the ordinary, that he might either decrease the vicarage and add to the rectory, or decrease the rectory and add to the vicarage; that the endowment of the vicarage, and how much belonged to it, was a spiritual thing, and belonged to the ordinary; that one parson cannot give to another parson

Vicarage endowed.

without license. *Sed per Curiam*, The thing in demand is a matter of freehold, which cannot be tried by the ordinary especially, there being a warranty and the act of a stranger in the case: it is true, heretofore it was held that a vicar could not maintain an action against the rector, but that was when the vicar had no certain estate in his possessions; but now the law is altered, for the vicar is endowed to him and his successors in severalty, which is a fixed estate, and therefore he may maintain an *assize* against the *rector*, as well as against a stranger; and it may be that the lands in question were not derived from the rectory, and assigned by the ordinary to the vicarage, but given and annexed to it by a lay-stranger.

What is a rectory. 2 Leon. 10, 11. Sid. 91. contra. Vaugh. 497. Lut. 63.

3. As concerning a *rectory*, it is an aggregate inheritance, and must consist of *lands* as well as *tithes*, there must be the church and churchyard at least; and therefore where the plaintiff declares of a *rectory*, he must prove more than *tithes*; but yet a rectory may be without *glebe*, for the rector may have conveyed away his *glebe*, and there are many compositions between the *rector or vicar*, by which all the tithes and glebe are conveyed to the *vicar*, reserving only a rent to the parson; and the glebe, originally considered, was only an additament *ex dono fundatoris*, and the common law, upon the creation of a parson, gives him nothing but the tithes.

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What is the glebe.

4. SMITH *v.* WALLER.

[Trin. 12 Will. 3. B. R.]

Vicar is endowed out of the rectory. Vent. 15. 2 Rol 341.

WHERE the *vicar is endowed*, and comes in by *institution* and *induction*, he hath *curam animarum actualiter*, and is not to be removed at the pleasure of the *rector*, who in this case hath only *curam animarum habitualiter;* but where the *vicar* is not endowed, nor comes in by *institution* and *induction*, the *rector* hath *curam animarum actualiter*, and may remove the vicar at pleasure; and where a *vicar is endowed*, it is always out of the *rectory*, and by the act of the *ordinary;* therefore where the question is, whether it be a *vicarage* or not, it shall be tried in the *Spiritual Court*, because it could not begin or be created but by the ordinary, and with his concurrence, and so it is of an *appropriation*.

2 Cro. 518.

5. LUTTON *v.* KING.

Libel by a vicar to have his vicarage augmented.

BEFORE the statute 31 *H.* 8., a vicar might libel in the Spiritual Court for an *augmentation of his vicarage;* for, upon the creation of vicarages, that power was

commonly reserved, and where it was not reserved the *bishop could not augment them*, and libels for that purpose were frequently exhibited against *impropriators*; but now since by the statute *impropriations* are made *lay-fees*, the ordinary cannot intermeddle, neither could they have sued for tithes in the Spiritual Court, if that power was not particularly saved to them by the statute: But there seems to be a difference where a *vicar* sues a *lay-impropriator*, and where the *impropriator is a spiritual person*, for in the last case it is probable he may sue for an *augmentation*: and in some cases, where the impropriation is not a *lay-fee*, as in the case of the *choristers of Salisbury*, where the appropriation of a parsonage was made to them before the statute, and continues so still, and in such case the bishop may make an augmentation, if that power is reserved, for the persons are subject to his command.

1 Mod. 50. Where the endowment is lost, the tithes must be paid according to custom.

*6. A *vicar* libelled for tithes of *wood*, the defendant suggested for a prohibition, that time out of mind they had paid no small tithes to the vicar, but that by the custom of the parish they were paid to the *parson*: *Per Curiam*, if the endowment of the vicarage is lost, the tithes must be paid according to custom.

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VISITATION AND VISITOR.

See the Case of Proxies, Davies 1.

What are procurations.

1. *PROXIES* or *procuracies*, so called by the *canonists*, because upon every visitation by the bishop, the parson or church visited were to *procure* necessary provisions for the *visitor*, and this provision was originally *in esculentis, & poculentis*; but as our socage, which was so many days ploughing the lord's land, came in time to be converted into certain payments of money, so this provision was changed into a certain sum of money paid to the ordinary, as being *de jure visitor* of all churches within his diocese; and being thus settled, it was paid and became due whether there was actually any visitation or not, as that rent, which the tanant was to pay in lieu of his *socage service*, came in time to be due and demandable whether the lord had demesnes to plough or not.

Procurations are part of the bishop's revenue.

2. These *proxies* are now part of the settled revenue of the bishop's fee, the king himself pays them for his *ap-*

propriations, as the abbeys did before the dissolution, when they had appropriated churches.

Noy 123.

3. The *commissary*, at this court of visitation, cannot cite *lay-parishioners*, unless only *churchwardens* and *sidesmen*, and to these he may give his articles, and inquire by them.

1 Cro. 340. The archbiship never visits the diocese of London.

4. The *Archbishop* of *Canterbury* never visits the *diocese of London*, this is by agreement between them; and in consideration thereof, if a cause arises within the *diocese of London*, and the suit is brought in the arches before the archbishop, though this is *per saltum*, yet the *bishop of London* is to allow it.

Of visitors of lay-foundations. [* 380]

*5. As to visitors of lay-foundations, they are either by appointment of the *founder*, or by implication of law; those which are by appointment are such to whom the founder delegates that power.

The founder and his heirs are visitors. 2 Inst. 68. Sho. P. C. 45.

6. By implication of law, the founder and his heirs are visitors, if no particular person is appointed; and this is a reservation the law makes to him in lieu of the land which he parted withal; and as the foundation is a creature of his own, so it is reasonable that it should be visited by his heirs, to see that the charity of their ancestor is not perverted.

Dy. 209. 3 Mod. 265. Skin. 13. 1 Bl. Rep. 22.

7. Corporations aggregate and instituted by private charity, if they are lay, they are visitable by the founder, or by whom he appoints, and from the sentence of such visitor there lies no appeal.

2 Rol. 229.

8. But if spiritual, it is visitable by the ordinary, and from his sentence an appeal lies. 2 *Show.* 74. *Quære.*

VISNE.

Vide Stat. 4 & 5 *Ann.* ch. 16. 3 *Geo.* 2. ch. 25.

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1. WILSON *v.* LAWS.

[Pasch. 6 Will. 3. B. R. 1 Ld. Raym. 20. S. C.]

lk. 59, 60. ll. Rep. 28. 559. 282, 898. . 313.

IN an *appeal of murder*, it was objected, that the fact was laid in the *parish* of *St. Giles in the Fields*, when it should be in the *vill*, as it ought to be in the statute of *Gloucester*: *Sed non allocatur*, for the *parish* shall be intended a *vill*, and there is no difference between a *parish* and a

vill; it is true a *parish* may contain more *vills* than one, but that shall not be intended unless shewn.

2. BOOTH *v.* JOHNSON.

[Hill. 1 Annæ.]

WHERE the plaintiff in his declaration lays the *visne* in *Gray's Inn* or *Whitehall*, which are no *vills*, yet after a verdict or demurrer they shall be intended to be vills, and therefore if the defendant will take any advantage, he must plead no such *vill* as *Gray's Inn, &c.*

Sid. 326. Lut. 305. Where a place which is no vill shall be intended to be a vill, after a demurrer, or verdict.

3. THE QUEEN *v.* INHABITANTS OF WILTS.

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[Trin. 3 Annæ.]

IN an information against the *county of Wilts*, for not repairing *Laycock bridge*, the Court held that the attorney-general might take a *venire facias* to any adjacent county, and that it might be *de corpore* of the whole, or *de vicenēto* of some particular place therein next adjoining.

6 Mod. 307.

6 Mod. 191.

4. WAY *v.* GALLY.

[Trin. 3 Ann. B. R.]

THE lessor brought an action of *debt* against the lessee for *rent*, upon a demise of lands in *Jamaica*, and laid his action in *London;* the defendant pleaded, that the lands were in *Jamaica*, and there are courts there, *&c.* Adjudged upon demurrer that this plea is ill; but if in any action laid here, a local issue should arise (as suppose in *Ireland*), it may be tried in the county where the action is laid, according to *Dowdale*'s case, or a suggestion may be entered on the roll, that such a place in such a county lies next to *Ireland*, and so have a jury from thence.

Mod. Cases 194
2 Salk. 651.
6 Rep. 46.

5. ANONYMOUS.

RULED, that the want of a *venue* is only curable by such a plea which admits the fact for the trial whereof it was necessary to lay a *venue:* The plaintiff declared on a bond, and laid *no venue*, the defendant pleads a *release;* now by this plea the want of a *venue* is cured; *aliter* if he had demurred; *quære*, if he had pleaded *non est factum.*

Where the want of a venue is cured.
Vide Hob. 82.
2 Cro. 682, 125.
2 Rol. 66.
8 Cro. 120.
Lut. 487.

Vide 1 Salk.165.

UNION.

Though by an union both churches are one parish, yet as to taxes and repairs they are several.

1. BY an *union*, both churches become one, and one *parish*, one *benefice*, and one *advowson;* but as to taxes and repairs, they are several, for otherwise it might be prejudicial, because the old church may be less in proportion than the new, to which it is united.

Who may make an union.

2. Where the churches are poor and void, the patron and ordinary might make an union without the king, but not if they were rich; for an advowson lying in tenure, the king hath a possibility of an *escheat*, *lapse*, *&c. which could not* be lost without his consent.

3. If the church is *full*, then both *parson*, *patron*, and *ordinary* must consent to an *union*.

3 Cro. 719.

4. In a *quære impedit*, the defendant pleaded a dispensation for two benefices, and upon *oyer* of the letters patents of dispensation, it was thus:

The form of an union.

5. *ss.* It took notice, that there were two benefices, and of small value, therefore *unimus*, *incorparamus*, *&* *anneximus*, the one to the other, *for the life of W. R.* the present incumbent; it was objected that here were no words of *dispensation*, and therefore this clause cannot enure as a *dispensation*, neither can it be an union, because it is done by the king alone, without the concurrence of the patron and ordinary: *Sed per Curiam*, though there cannot be a perpetual union without such concurrence, because it is a loss both to patron and ordinary, yet there may be a temporary union, as in this case, for the life of the incumbent, and this might be done by the *metropolitan* alone, for after the death of the incumbent the union is dissolved, and no loss accrues either to the patron or ordinary in the mean time, for the one hath his presentation and the other his admission, and this is a complete *dispensation*, and allowed by the statute 31 *&* 37 *H.* 8. *cap.* 21. (*viz.*) Any license, union, or dispensation to the contrary.

UNIVERSITIES.

1. *OCTOGINTA damus apud actum Oxford. dat. cla.* 19 *Ed.* 1. *Memb.* 6. *v.* 3.

2. *Strata civitatis mandat. per breve regis emendari per burgenses Oxon. & quod porcuaria destruantur. Claus.* 29 *Ed.* 1. *Memb.* 14. *D.* 2.

3. *Breve regis ne justa & alia facta armorum fiant prope Oxon. ne quies scholar. impediatur. Claus.* 33 *Ed.* 1. *Memb.* 2. *D.* 1. *Memb.* 3. *v.* 2.

4. *Breve majori & ballivis Oxon. de assisa panis & vini observand. & de rationabili precio super victualia imponend. sicut per juramentum cancellario & procuratoribus astringuntur. Claus.* 33 *Ed.* 1. *Memb.* 18. *D.* 2.

5. The *University of Oxford* hath jurisdiction in all *trespasses, injuries, quarrels, crimes,* and *matters* whatsoever (*a*) which do not concern *life* or *freehold.*

Where they have jurisdiction, and where not.

6. But an *ejectment* for the right of a *chattel real;* as for instance, of a *lease for years,* shall not be determined there, for though a freehold is not recovered, yet the land is drawn from him who perhaps might have the freehold.

Vide Lit. 10. 1 Salk. 343.

7. Neither have they any jurisdiction, unless the plaintiff or defendant be a *scholar* or a *servant* of the university, or of some *college;* but if either of them is a scholar, it is then a matter within their jurisdiction; but yet, if either of them is entered into a college by a trick to avoid a suit in *B. R.*, or to excuse himself from town offices, their privilege shall not be allowed.

Cro. Car. 73, 88. 1 Mod. 164. 2 Vent. 106.

8. The *university* demanded *conusance* of a suit brought in the *Exchequer* by *quo minus*, and it was allowed.

Hard. 505. No such claim after imparlance.

9. Debt against the defendant, a townsman in *Oxford*, for refusing to execute an office in the corporation: It was moved, that he being a servant to Dr. *Irish*, might have the privilege of the university, and a charter was produced, by which it was granted, that the members and servants of the university should be sued in the Vice-chancellor's Court, and not elsewhere; and a certificate from the Chancellor, directed to the *Chief Justice*, that the defendant was matriculated and registered in the university; but it appearing to the Court that this was done two days, and no more, before he was chosen to this office, and that he was a painter by trade, and had lived several years in the corporation, and no servant attending Dr. *Irish*, the privilege of the university was not allowed.

2 Show. 352. 2 Vent. 106. [384] Vide Doug. 530.

(*a*) It cannot hold plea for the penalty of a statute. *Skin.* 665.

USES.

1. USES were not at common law, neither were they ever mentioned till the reign of *R.* 2. and therefore there is no remedy at law for them.

1 Rep. 126, 129, 187, 133.

2. But yet the *estate and limitation of an use* ought to be governed and directed by the rules of common law; and there is no difference between estates conveyed by way of *use* and by way of possession.

3. Where a man intends to pass an estate at and by a common law conveyance, it shall never take effect as a *covenant to stand seised;* or as a conveyance upon the *statute of uses.*

1 Inst. 49.

4. As for instance, if by deed I *give, grant,* and *enfeoff* my son, *&c.* with *a letter of attorney to make livery*, this shall not enure as a *covenant to stand seised;* but it might have been otherwise if there had been no *letter of attorney* in the deed.

See Samms v. Jones.

5. The father being seised of a reversion, *granted* and *confirmed* the same to his son, *to the use of himself for life, remainder to his son*, without any attornment, this conveyance is void; yet if there had been *no limitation of the use*, this deed might have enured as a covenant to stand seised.

See Hore v. Dix.

6. So where by deed between the father and son of the one part, and *W. R.* of the other part, the father did *give, grant, and enfeoff W. R.* to the use of his son; there being no *livery*, this is a void conveyance.

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7. Now as to considerations to raise an use, the cases are, if the conveyance is by way of covenant, the consideration must be either *natural affection* or *marriage*.

8. If it is by *bargain and sale*, then the consideration it be *money*.

9. Therefore *a covenant to stand seised* to the use of his son, and his wife whom he shall marry, this is good.

2 Rol. 260. 2 Cro. 181. 1 Lev 30.

10. But a covenant to stand seised to the use of himself for life, remainder over, with a power to let leases for forty years to persons who are strangers; this is not good as to the strangers, because they are not privy to the consideration; but if it had been to make leases to any of his children or kindred, it had been good.

1 Cro. 530. Vi. Plowd. 307. Jon. 419. 2 Rol. 783. Str 931.

11. So a *covenant to stand seised* to the use of *A.* and *B.*, and *C. his brother*, this is good as to the brother, and it is entirely in him, but void as to the other two, because not privy to the consideration.

12. In a *covenant to stand seised*, the word *covenant* is but *declaratory;* therefore, if the father by deed sets forth, that he stands seised to the use of his son, and doth not covenant to stand seised, yet it is a good covenant.

1 Vent. 140. 2 Rol. 787. 3 Mod. 237. Ray. 46. 2 Vez. 252. 2 Wils. 22, 75.

13. So if by deed the father *grants* his lands to his son in tail, this is a good covenant to stand seised.

See Buckley v. Simonds.

14. For if the word *covenant* was obligatory, the deed should not enure as a *covenant to stand seised.*

15. Therefore, if the father *covenants* that his lands shall *go*, *remain*, and *descend* to his son after his decease, or that he will convey to his son, this is not a covenant to stand seised, for it is only obligatory to a future thing.

2 Rol. 788. 1 Sid. 3. Vide 2 Lev. 77, 226.

16. But if the father *covenants to stand seised* to the use of the son, and to do any act for farther assurance, or to levy a fine to the use of his son in tail, and that if not levied before such a time, that then he will stand seised to his use, this shall enure as a covenant to stand seised.

Wm. 37. 3 Lev. 306.

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17. It has been already said, that there were no such things as *uses at common law;* the reason was, because the feoffee was always taken as the owner of the land, and that it was very inconvenient and absurd that there should be two several fees and owners of the same land *simul & semel;* therefore at common law the feoffees to uses were the very tenants, and had a right to forfeit.

18. But the statute to remedy this inconvenience hath united the estate to the use; so that now the feoffees to uses have no estate or interest at all, but in respect of the contingent estates and uses limited in the deed.

19. And this is neither a naked authority, nor a mere estate which they have, but *aliquid medium* between the estate and authority, they have *scintilla juris* and a *possibilitas usus emergentis.*

Vi. Fearne C. R. 444. (225.)

20. Some questions have been made, out of what an use shall arise; as, for instance, it hath been held, that uses shall be raised only out of a freehold, that they cannot be raised out of a chattel, because that is in nature of a trust, nor out of an use, nor out of a bare right, nor out of an intended purchase; as where a man covenants to stand seised of lands which he intends to purchase, nor out of such things which *ipso usu consumuntur*, as commons, *&c.*

Sir W. Jon. 127. Moor 509.

21. But *rents*, *liberties*, and *franchises*, and such *local inheritances*, may be granted to use; but not mere personal inheritances, as annuities.

22. Where a *feoffment* is made without express use or consideration, there the use shall be in the feoffor by implication of law; but it is otherwise where a man makes a gift intail, for there is a tenure, which is a consideration.

Dyer 10.

23. LAMPLUGH v. SHOTTERELL.

[Pasch. 1 Annæ, B. R. 2 Ld. Raym. 798. S. C.]

2 Salk. 678. S.C. Farr. 71. Where an use shall result.

THE case was, a *bargain and sale* was made for a year in consideration of 5 *s.* paid, and thereupon a release to the bargainee and his heirs, without expressing any consideration; the question was, Whether the use should result to the bargainor? and it was insisted that it should not, because the release doth not enlarge the first estate, and that is to the use of the bargainee, and both are but as one conveyance, and the 5 *s.* mentioned in the lease extends to the release, and the *quantum* of the consideration is not material, for a penny is sufficient; but on the other side it was argued, that this conveyance is in nature of a feoffment, upon which an use shall result to the feoffor where no consideration is expressed.

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* 27 H. 8.

24. *Holt*, Ch. Just. Before the statute of * uses there might be a reason why an use should result upon a feoffment, for it put the estate out of the feoffor, and he had only a trust left which could not be forfeited; and to this purpose such feoffments were made, but this cannot be since the statute; for if an use must result to the feoffor, and the estate must be executed to the use, the feoffment is in vain, and the party hath made a conveyance to no manner of purpose, being in the same estate as he was before he made the feoffment; and so it is of a lease and release; but it is otherwise upon a fine or recovery, for they may have their particular estate in other respects, as barring upon nonclaims or remainders.

So it is if by feoffment, or by lease and release, a man conveys any particular estate mediate or immediate, to another person, there the residue of the estate shall, by implication of law, remain in the party himself; but where no estate is limited to another, there the whole conveyance is to no purpose, if the party be construed to have the resulting use to him.

1 Mod. 262. 2 Vent. 35. 2 Mod. 249. What is a good consideration to raise an use.

25. In a special verdict in ejectment, the only point was, Whether a lease for a year, made upon no other consideration than the reservation of a pepper-corn, shall operate as a *bargain and sale*, and make the lessee capable to take a *release? Et per Curiam*, it shall, for the reservation of a pepper-corn is a sufficient consideration to raise an use.

USURPATION.

F. N. B. 31. 2 Inst. 358. 3 Bl. Com. 242.

1. AT *common law* the patron in fee was put out of possession by an *usurpation*, and though he might recover the advowson itself by a *writ of right*, yet he had no remedy for the *presentation hac vice*, nor if an another avoidance happen, unless he brought his writ of right, and recontinued the advowson.

2. If the patron had the advowson *in tail*, or *for life*, this turn, and also his whole advowson, was gone.

3. If an *usurpation* was made upon *tenant by the courtesy*, or in *dower*, or upon a lessee for years, or upon a bishop in time of a vacancy, neither the heir or he in reversion or successor, could present at the next term, but now this is altered by the statute, and the law is,

Hutt. 66. Stat. 7 Ann. c. 18. Stat. Westm. 2. 13 Ed. 1. c. 5.

4. That if there be an *usurpation* upon a patron *in fee*, he may bring a *quare impedit* for the present turn, but then it must be brought within six months, otherwise he is put to his writ of right of advowson.

5. But if he is only patron *for life*, and doth not bring his *quare impedit* within six months, he hath lost his advowson for ever, for his interest is discontinued, and he cannot present or maintain a *quare impedit* for the next turn, being out of possession, and a writ of right will not lie; therefore the estate in reversion is discharged of that interest, but he in reversion may have a writ of right.

6. If there is an *usurpation* on a *tenant in dower*, or *tenant by the courtesy* or *guardian*, and six months pass after the particular estates are determined, and the heir comes of age, the heir may maintain a *quare impedit*, or present to the next avoidance; and if he doth not, then he is put to his writ of right.

7. And so it is if the ancestor grant the advowson for life or years, and an usurpation is made, the heir may maintain a *quare impedit* for the next avoidance, as his ancestor might have done; so it is of a successor, for a reversion by descent, and a succession, are within the statute, but a reversion by purchase is not.

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8. Upon the statute of 1 *Eliz.*, if an *usurpation* be on a bishop, it shall bind him, because he suffered it; but his successor may present to the next avoidance, or bring a *quare impedit*, though he is out of possession. *Jones* 46.

9. An usurpation cannot put the king out of *possession* of his land, much less divest an *inheritance* out of him, therefore it cannot divest the *inheritance* of an *advowson* out of him, for nothing can go out of him without a record, no more than it can come to him.

10. But an usurpation may dispossess him of his presentation, (*i. e.*) it may bind his possession, so as he cannot remove the incumbent, without a *quare impedit*, though it cannot so divest his estate in an advowson as to bind his inheritance and put him to a writ of right, *&c.*

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11. MUGG *v.* BROWN.

[Pasch. 12 Will. 3. B. R.]

1 Salk. 161. S. C. Of letters patents ad corroborandum.

IF an incumbent be in by usurpation on the king, and would be confirmed, he must not procure a new presentation from the king, because that would be void, the church being full; but he must get the king's letters patents reciting the whole matter, and therein granting the church to him: And *per Holt*, Ch. Just. these are called *letters patents ad corroborandum.*

Hutt. 66. Usurpation on lessee for years.

12. An usurpation upon a lessee for years gains the fee-simple, and puts the true patron out of possession; and though by the statute of *Westm.* 2., he in reversion, after the determination of the lease for years, may have a *quare impedit* when the church is void, or may present, and if his clerk is instituted and inducted, then he is remitted to his former title, yet till that is done, the usurper hath the fee, and the writ of right of advowson lies against him.

3 Bulst. 38.

13. *Quare impedit*, the defendant pleaded an usurpation made by the queen after the death of the last incumbent, and that her clerk was admitted, instituted, and inducted, and was in possession for six months; the plaintiff replied and set forth, that the patron had brought a *quare impedit* against him who was incumbent upon the queen's presentation, and had judgment against him by default: [390] And *per Curiam*, by this judgment the patron was remitted to his former right; but it had been otherwise if the queen had presented on a deprivation, for there the patron must have six months to present after notice of the deprivation.

USURY. See Indictment 8.

1. THERE must be a corrupt agreement for more than statute interest, otherwise it is not usury, and the defendant shall not be punished, unless he *receive some part of the money in affirmance of the usurious agreement, for it is the *receipt* and not the *contract*, which makes him punishable.

2 Cro. 677. Cro. Car. 101. Noy 143. 2 Vent. 83. *Noy 133. Vide ac. Doug. 235. 3 Wils. 262. 2 Bl. 796. 1 Hawk. ch. 82. s 3.

2. Interest upon *bottomry bonds*, which is *fœnus nauticum* or *usura maritima*, is not within the statute.

3. MASON *v.* ABDY.

[Trin. 1 Will. 3. B. R.]

THE obligor was bound in a bond of 300*l.* conditioned to pay 22*l.* 10 *s.* *premium* at the end of the first three months after the date, &c., and sixpence in the pound at the end of six months, as a farther *premium*, together with the principal itself, in case the obligor be then living, but if he die within that time, then the principal to be lost; adjudged this is an usurious contract, because there was a possibility that the obligor *might live* so long; and there is an express provision to have the principal again.

What is an usurious contract. Carth. 68. 2 Rol. 47. Mo 398. 2 Cro. 508. Cro. Eliz. 642, 741. 5 Co. 69. Cowp. 770. 1 Wils. 286. 1 Atk. 304.

4. Debt upon bond, dated 24 *May*, conditioned to *pay* 300*l.* on the 25th *day of February*, &c. The defendant pleaded in bar, that *after the making the said bond* (*viz.*) such a day the plaintiff *corrupte recepit* of the defendant 30*l.* for the use of the said 300*l.* for one year, (*viz.*) from such a day to such a day, which is more than six *per cent. per annum*, *contra formam statuti;* and upon a demurrer to this plea it was adjudged ill, because the †statute makes all bonds void, where *money is* ‡*lent upon or for usury*, and where more is taken than *after the rate of six per cent.* But this bond doth not appear to be *for money lent upon or for usury*, but for payment of a just debt; and if there is an usurious contract §after the bond made, that shall not affect the bond to make it void, because it was good at the time it was made; but by the latter clause of the statute such an usurious contract is punishable by forfeiture of treble the value.

Where *corrupte recepit* is no good plea. 3 Mod. 35. Jon. 410. Cro. El. 20. 1 H. Bl. 462. Cowp. 114. 1 Freem. 253. 1 Hawk. ch. 82. s. 12.

†12 Car. 2. c. 13. ‡Postea 6. S. P.

§Post. 5. S. P.

5. Information was brought upon the same statute, setting forth, that the defendant, 16 *Novemb.* 20 *Car.* 2.,

Raym. 196. 1 Mod. 69.

Vide 2 Bur. 1077. Cowp. 112. 1 H. Bl. Rep. 462.

lent *W. R.* 20*l.* till *June* following, which is six months, and that afterwards, (*viz.*) *ad finem termini prædict.*, he took of the plaintiff *corrupte & extorsive* thirty shillings for the loan thereof, which is more than allowed by the statute. Upon not guilty pleaded, the jury found for the informer; but the judgment was set aside, because it appears that this corrupt agreement was made **ad finem termini*, when by the statute it must be at the *time of the contract made*, and if the contract is not then usurious, the assurance is not void; but the borrower shall have treble the value, as forfeited by the statute.

*Antea 4. S. P.

Ventr. 38. Sid. 421. Where judgment cannot be given upon the statute, it shall be given as at common law.

6. Information against the defendant, for that he on the 30*th of May, &c.*, by way of *corrupt contract and agreement, cepit & ad lucrum suu. convertit* 40 *s.* for deferring the day of payment of 25*l.* from the 29*th of July to the* 30*th of May* (which was the day on which he took the 40 *s. contra formam statuti*); after a verdict for the plaintiff, it was moved in arrest of judgment, that it did not appear by this information that the 25*l.* was money lent; but if it had it is ill, because the taking the 40 *s.* was after the lending, and there was no corrupt agreement laid either before or at the lending. *Sed per Curiam*, If upon this information judgment cannot be given on the *statute* to pay *treble the money* taken, yet being found that the defendant took 40 *s.* by a corrupt agreement, judgment shall be given against him at common law, which is *fine and imprisonment.*

Latw. Grange's Case. Where the statute was not pleaded, the bond, though usurious, is good.

7. Debt upon bond conditioned, that in consideration of 12*l.* paid by the plaintiff to the defendant, he became bound to pay the said plaintiff 14*l.* *if he lived six months after the date of the bond;* there was a plea and demurrer, and it was objected, that it appears by the very condition of this bond, that the contract was usurious, it being to pay 14*l.* for 12*l.* in six months after the date of the bond; it is true, this might have made the bond void, if the statute had been pleaded, but that not being done, this objection comes too late.

What contract for extraordinary interest is good, and what not. Vide 1 Wils. 286. 1 Atk. 304.

8. The distinction in the books is, that where the principal and interest are both in danger of being lost, there the contract for extraordinary interest is not *usurious;* but where the principal is well secured, and the interest only in danger, it is otherwise.

WAY.

1. INFORMATION against the *hundred of Yarnton*, for not *repairing a highway*, the defendants pleaded that *non reparare debent*, upon which they were at issue, and though it was ill, the Court would not quash it till the issue was tried, that it might be known who ought to repair, and upon the trial the jury found *quod reparare non debent;* but did not find who ought to repair, and therefore it was insisted that no judgment could be given. *Sed per Curiam*, The judgment shall be, that the *hundred of Yarnton eat acquieta*, and that the other vills between whom the issue was, should repair.

Sid. 140. The jury find, that the defendants reparare non debent, but did not find who ought to repair.

2. Indictment at the sessions for stopping *communem viam pedestrem, ad ecclesiam, ad commune nocumentum, &c.*, it was objected, that an indictment would not lie for stopping a *foot-way to the church*, because it was only a *nuisance* to the parishioners, and no more than a private damage(*a*). *Sed per Curiam*, It being laid *ad commune nocumentum*, the church may be the *terminus ad quem, &c.*, and the way may lead further.

1 Vent. 208. Indictment for stopping a foot-way to the church, ad commune nocumentum, good.

3. Where a *parish* is indicted for not repairing a way, they cannot plead not guilty, and give in *evidence* that such a person is bound to repair either by *tenure* or *prescription*, because the parish is liable *de communi jure;* but if they would discharge themselves they must plead the *tenure* or *prescription*.

1 Vent. 256. 1 Mod. 112. How a parish must plead if indicted for not repairing. Ld. Raym. 725. Str 179. 1 Hawk. ch. 76. s. 9, 93.

4. Presentment in the sessions by *one justice*, that the highway in *Stoke common* was out of repair, and that Sir *N. S.* ought to repair it *ratione tenuræ* of certain lands, parcel of the said common, which he had *encroached* and inclosed from the highway, and which time out of mind had been parcel of the highway, and that he did not repair it *ad commune nocumentum, &c.* This presentment being removed into *B. R.* the defendant pleaded, that the inhabitants of *Stoke* ought to repair it, and traversed, that he ought to repair *ratione tenuræ;* and upon a demurrer to this plea it was objected that it was ill, because the defendant had not answered the *encroachment*, which was the principal matter. *Sed per Curiam*, the defendant being charged to repair *ratione tenuræ*, that is the chief matter to be answered, because if he had been chargeable by

Sid. 464. 2 Saund. 160. Where the defendant was charged ratione tenuræ.

(*a*) *Vide* 1 *Hawk.* ch. 76. s. 1.

reason of the *encroachment*, he ought not to have been charged *ratione tenuræ;* for there is a great difference between the one and the other, because where there is an *encroachment*, the party may lay it open when he will, and then he is no longer chargeable to repair(*a*); but where the charge is *ratione tenuræ*, he is still bound to repair, though he lay it open to the highway.

Raym. 215. Upon an indictment for not repairing, the defendant may be admitted to a fine on a certificate, that it is repaired, but not after a verdict.

5. Upon an indictment for not repairing a *highway*, if the defendant produce a certificate before the trial, that the way is repaired, he shall be admitted to a *fine;* but after a verdict such certificate will be too late, for then there must be a *constat* to the sheriff, and he ought to return, that the way is repaired, because the verdict being a *record*, must be answered by record.

2 Vent. 166. Where the pltff. declared on his possession, and held good. Lut. 120. Com. Pleader, C. 39. 3d edit. vol. 5. page 347.

6. Case, *&c.*, for *stopping a way*, in which the plaintiff declared, that he was *possessed* of an ancient messuage, and had a footway over the defendant's ground, as belonging to the said messuage, *& de jure habet*, and that the defendant stopped it: Upon demurrer to this declaration it was objected, that it was ill, because the plaintiff did not *prescribe*, or otherwise entitle himself to this way than only by a bare *possession* of a house. *Sed per Curiam*, the declaration is good, it being no more than a *possessory action.*

1 Vent. 189. What is a highway, and what not.

Vi. ac. 1 Hawk. ch. 76. s. 1.

7. Indictment was found against the defendant, for that he *vi & armis* part of the highway, leading from *Shoreditch* to *Stoke*, *&c. postibus & repagulis inclusit:* Upon a trial at bar the chief question was, Whether the place inclosed was an highway or not? *Et per Hale*, Ch. Just. A way leading to any market town, and communicating with any great road, is a highway; but if it lead only to a church, or to a house or village, or to some particular close, it is a *private way;* and that the *parish of* common right is to repair the highway, unless particular persons are obliged by custom or prescription, but private ways are to be repaired by the *village* or *hamlet*, and sometimes by a particular person.

(*a*) *Vide* 1 *Bur.* 465.

WILLS.

1. FISHER *v.* NICHOLLS.

[Hill. 12 Will. 3. B. R.]

IN this case it was said by *Holt*, Ch. Just. that in wills the construction is more favourable to fulfil the intent of the testator, than it is in deeds or other conveyances executed by him in his lifetime; therefore where there is a gift by will to *W. R.* and *his assigns* for ever, this is an estate in fee; but if by deed, it is no more than an estate *for life;* so if a gift be made to *W. R.* and his heirs male, by will, is an *estate-tail*, but by a deed, it is a *fee-simple;* so a devise to his *eldest son* and his heirs, after the death of the wife of the testator, is *an estate for life to the wife by implication*, but it is not so in a deed; the reason of this difference is not because the testator is *inops concilii*, but because a will is not a common-law conveyance; but by the statute, it is true, there were wills before the statute of *H.* 7. [32 *H.* 8.] but those were not by common law, but by custom, as in case of *burgage lands:* Now as a custom enabled men to dispose of their lands in this manner by their wills, and not according to the rules and forms of common law conveyances, so it exempted this kind of conveyance from the regularity and propriety requisite in those conveyances; and by this means it came to pass, that wills by the statute, in imitation of those by custom, gained such favourable constructions.

Wills are more favourably construed than any other deed.

Co. Lit. 9. b.

By the statute 29 *Car.* 2. *cap.* 3. there is a considerable alteration made in the law relating to wills in writing; for by that statute it is enacted, that *the will must be written in the lifetime of the testator*, and signed *by him, or some other person in his presence, and by his direction; and that the witnesses shall subscribe their names in his presence.*

WITNESSES TO WILLS.

1. DAVY *and* NICHOLAS *v.* ANN SMITH.

[Pasch. 5 Will. 3. B. R.]

What shall be a sufficient subscribing in the presence of the testator.
* 29 Car. 2. cap. 3.

Vide ac. 2 Salk. 688.

UPON a trial at bar, the question was, Whether the *witnesses* to a will had pursued the directions of the statute of **frauds, &c.* in *subscribing* their names? and it was resolved, that where the testator lay in a bed in one room, and the witnesses went through a small passage into another room, and there set their names at a table in the middle of the room, and opposite to the door, and both that, and the door of the room where the testator lay, were open, so that he might see them subscribe their names if he would; and though there was no positive proof that he did see them subscribe, yet that was a sufficient subscribing within the meaning of the statute, because it was possible that the testator might see them subscribe; and therefore, *per Curiam*, if the witnesses subscribe their names in the same room where the testator lies, though the curtains of the bed are drawn close, it is a good subscribing within this statute; because, if it is in his power to see them, and what is done, it shall be construed to be in his presence.

2. LEA *v.* LIBB.

[1 Will. 3. B. R.]

Show. 68.
3 Mod. 262.
Where two witnesses to a will, and one to a codicil, doth not make three witnesses to that will.

Powell on Devises, 100.
Prec. Ch. 270.
Gilb. Eq. 5.
2 Vern. 507.
Comyns 381, 384.

THE testator made his will in writing, subscribed by *two witnesses*, and devised all his lands to *W. R.*, afterwards he made a *codicil*, in which his will was recited; and this also was attested by *two witnesses*, one of which witnesses was a witness to the will, but the other was a *new witness;* the question was, Whether this *new witness* should make a *third to the will*, the statute requiring that there should be *three?* and adjudged that he should not; it is true, here are three witnesses to the intent and will of the testator, but there are but two to his *will in writing;* it is true likewise, that there are two witnesses to the *codicil*, but those are not witnesses to the written will,

so that there wants one witness to the *will in writing* (*a*).

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3. By the *canon law*, and so likewise by our law, *two witnesses* are requisite to prove a will for goods, and *three for lands;* but now by the* statute it is required, that these witnesses *should subscribe their names in the presence of the testator;* and since the making that statute there have been some remarkable cases, both as to the manner and number of the witnesses subscribing.

* 29 Car. 2. cap. 3.

4. And, first, as to the manner of subscribing: *ss.* The case was, there were *three witnesses*, but they did not subscribe their names *at the same time*, but *severally*, at the request of the testator, and at *several times*, and were not all present at one and the same time, this was decreed a good will (*b*).

2 Ch. Rep. 109. Where the witnesses subscribe at several times, it is good. Powell 110.

5. Then, as to the *number of witnesses*, see the case of † *Lea* and *Libb*, last mentioned, and this case: *ss.* The testatrix made a will in writing, according to the statute, by which she devised her lands to one *Petit*, and afterwards by another will she devised the same lands to the same person, and died, but this second will was defective in the circumstances of the witnesses subscribing their names in her presence, which they did not, and the will was held void for that reason, and by consequence no revocation of the first will, for that must be by a writing by which the testator declares his intention to revoke the first will.

† Antea 2.

Where the revocation must be be by writing operating as a will, or declaring an intention to revoke. Ecclestin v. Speke, 3 Mod. 258. 1 Sho. 89. Carth. 79. Onyons v. Tyrer, 1 Wms. 343. Pre. Ch. 429. 2 Vern. 741. Gilb. Eq. 130. Powell 631.

(*a*) But if the will be made at several times, although the parts of it be distinct, and each separately signed by the testator; yet if the intent of the testator appear from the circumstances to have been, that the instruments should constitute but one will, and should not operate as a will and codicil, the execution of the last part will take effect as an execution of the whole; and, if done pursuant to the statute of frauds, will render the entire paper valid as one will. *Powell* on Devises, 108. *Carleton* and *Griffin*, 1 *Bur.* 548.

(*b*) *R. ac.* 2 *Vern.* 429. *Pre. Ch.* 184. 2 *Atk.* 177.

WRITS, AND WRITS OF ERROR, OF THE TESTE AND RETURN, &c.

1. MASON v. MARCH.

[Trin. 11 Will. 3.]

No averment against the teste of a writ, when it is in support of justice.

IN false imprisonment laid to be in the vacation, if the defendant plead a writ taken out *teste in the term*, *per quod* he took the plaintiff, he (the plaintiff) may reply, that notwithstanding the *teste of the writ*, he took it out in *vacation time*; for where the *teste* of the *writ* is in support of justice, no averment shall be made against it: But *per Holt*, Ch. Just. it is otherwise where it is to justify a wrong (*a*).

2 Vent. 261. 2 Lev. 397. Debt lies on a judgment after a writ of error brought. Vi. ante, p. 333. 1 Sid. 236. Skin. 388, 590. 2 T. R. 78.

2. The plaintiff obtained a judgment, after a writ of error brought, he (*viz.*) the plaintiff, brought an action of debt on that judgment, the defendant, supposing it was suspended by the writ of error, demurred to the declaration: *Sed per Curiam*, he can have no advantage of this matter upon a *demurrer*, he ought to have plead it specially, and to pray judgment if he should be compelled to answer pending the writ of error.

Raym. 231. Where error is well assigned, there a plea in nullo est erratum is a confession of the fact. Yelv. 57. 2 Lev. 38. 2 Cro. 521.

3. In a writ of error to reverse a fine, *infancy* was assigned for error, and a *scire facias* issued against the ter-tenants and cognisee, who plead *in nullo est erratum: Et per Hale*, Ch. Just. where error is well assigned, (as it is in this case,) there *in nullo erratum* amounts to the confession of the fact, but where the error is not well assigned, there *in nullo est erratum* amounts to a demurrer; now in the principal case the infancy was well assigned as an error in fact, therefore the defendants ought not to have pleaded *in nullo est erratum*, but they ought to have pleaded to issue upon the *scire facias*.

Raym. 381. Appeals and writs of error stand good after the parliament is dissolved.

4. *Resolved by the Lords Spiritual and Temporal, that cases of appeals and writs of error shall continue, and are to be proceeded on, in statu quo, &c. as they stood at the dissolution of the last parliament, without beginning again de novo;* and [* 398] * likewise, that the dissolution of the last parliament doth

(*a*) *Quære*, Whether the *arrest* in this case was not before the *actual* suing out of the writ? The subject of averring the true time of suing out a writ to be different from the *teste*, is very fully considered by Lord *Mansfield* in the case of *Johnson* v. *Smith*, 2 *Bur.* 962.

not alter the statute of *impeachments* brought by the commons in that parliament (*a*).

Carth. 132. Vi. 1 Vent. 31. 1 Sid. 413. 2 Lev. 93.

(*a*) This point was resolved by both Houses on the impeachment of *Warren Hastings*, Esq. which was begun previous to the dissolution of parliament in 1790, and resumed the following sessions *in statu quo*.

WRIT OF ERROR.

1. COLLINS *v.* SCEVINGTON.

[Hill. 9 Will. 3. C. B.]

Where a writ of error is no supersedeas. 1 Rol. 754.

THE plaintiff obtained a judgment for 10*l.* the defendant brought a writ of error, supposing the judgment to be for 20*l.* adjudged this was no *supersedeas*, for executions are favoured in law as the fruits of men's actions, and therefore shall not be delayed without apparent cause, which was not in this case, because this could not be a writ of error upon that judgment (*b*).

(*b*) By stat. 5 *G.* 1. 3. writs of error are amendable.

2. WITTY *v.* POLEHAMPTON.

[Mich. 10 Will. 3. B. R.]

Where the judgment is not suspended by the writ of error. Vi. Str. 891.

W. R. gave a warrant of attorney to confess a judgment to *W. W.* as of *Trinity-term*, and afterwards to hang up that judgment, he brought a writ of error, *teste* 27 *June*, returnable 12 *July* following; *W. W.* the judgment-creditor having notice of this matter, entered up the judgment as of the *last day of that Trinity term*, so that the writ of error was returnable before the judgment was signed; and upon a complaint to the Court of this matter, they would do nothing in it, for if it was a trick, it was an honest one, and to obtain a just debt: So *per Curiam*, this judgment is not *suspended* by this writ of error; *aliter*, if the return had been after.

3. CARLETON *v.* MORTAUGH.

[Hill. 2 Annæ. 2 Ld. Raym. 1005. S. C.]

1 Salk. 268. Where the plaintiff cannot have a certiorari to certify whether any original, or not.

WRIT of error was brought in *B. R.* upon a judgment in *C. B.*, and the plaintiff in error assigned the want of an original for error; the defendant in error pleaded a *release* of all errors, but laid no *venue*, where the release was made, for which cause the plaintiff demurred to the plea, and in arguing this demurrer it was admitted, that the plaintiff could not pray a *certiorari* to certify whether there was any original or not, because the defendant, by his plea, had confessed that there was none, the fault being cured by the release of errors, and therefore it was doubted whether the Court could award a *certiorari*, and without it they could not reverse the judgment; for where the plaintiff in error assigns a good one, and the defendant pleads an ill bar, upon which there is a demurrer, the Court must reverse the judgment, because the error is confessed and admitted. *Et per Holt*, Ch. Just, where a release of errors is pleaded by the defendant, and upon issue joined it is found for the plaintiff, the Court cannot reverse the judgment.

WRIT OF INQUIRY.

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1. PAGETT *v.* PRESTON.

Where a judgment shall not be set aside after a writ of inquiry executed.

CASE in which the plaintiff declared upon an *indebitatus assumpsit*, and also on a *bill of exchange;* the defendant *quoad the bill of exchange* demurred, and said nothing as to the *indebitatus assumpsit*, thinking thereby to make a *discontinuance*, if the plaintiff did not take judgment by *nil dicit*, which he omitted, and only joined in *demurrer;* afterwards, when the paper-book was made up in the office, the clerk of the papers left out these words, *quoad billam excambii*, and the cause being put in the paper, judgment was given for the plaintiff, and a writ of inquiry was executed; and now upon a motion to set aside this judgment for irregularity, by omitting these words, *quoad billam excambii*, *Holt*, Ch. Just. said, they came too late,

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for they should have taken notice of it when it came into the paper-office, and not stay till a writ of inquiry was executed; it is a trick, for the defendant concluded, that the plaintiff would not take notice of it on a demurrer, being a thing of course; therefore the judgment was confirmed.

2. EAST *v.* ESTINGTON.

[Mich. 1 Annæ, B. R. 2 Ld. Raym. 810. S. C.]

IN this case it was held, that in all superior courts the judge sends his precept to the sheriff to inquire of damages; but in *London*, and all *inferior courts*, an inquest is summoned in court, and the Court takes the inquisition of damages.

1 Salk. 130.

3. *In replevin*, the defendant avowed for rent arrear, the plaintiff replied *non concessit*, *&c.* upon which they were at issue, and the jury found the value of the cattle taken, but did not find what rent was in arrear, so as the cattle might be sold to satisfy the rent according to the statute 17 *Car.* 2., and it being moved, that this might be supplied by a writ of inquiry, as it was in *Specott's case; per Curiam*, it was so done in that case, because the party might have his judgment at common law; but now, by this statute it is enacted, *That the value of the rent shall be inquired by the same jury which tries the issue*, and therefore it cannot be supplied by a writ of inquiry.

1 Lev. 255. Sid. 380, 381. Raym. 170. 1 Vent. 40. 5 Mod. 77, 119. Carth. 362. Where the imperfect finding by a jury shall not be supplied by a writ of inquiry. Vi. 1 Salk. 205.

FINIS.

THE

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FINIS.